Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MERCY MEMORIAL HOSPITAL CORPORATION,

Petitioner,

v.

HOSPITAL EMPLOYEE'S DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did The Court Of Appeals Depart From Established Law In Upholding An Arbitration Award Where The Arbitrator Found That The Grievant Deserved Discipline But Modified The Penalty Of Discharge By Reducing It To A Seven Day Suspension And The Collective Bargaining Agreement Expressly Precluded An Arbitrator From Modifying The Severity Of Discipline Or Substituting His Judgment For That Of The Employer In Disciplinary Matters?

II. Did The Court Of Appeals' Decision Conflict With Its Own Prior Decisions, Decisions Of Other Courts Of Appeals, And Decisions Of This Court In Holding That The Arbitrator Could, By Virtue Of A Standard "Just Cause" Provision, Ignore An Express Agreement Of The Parties Limiting His Power To Modify Or Alter Disciplinary Penalties?

III. Did The Court Of Appeals Commit Clear Error In Conflict With Decisions Of This Court And Its Own Prior Decisions In Holding That Even Though The Arbitrator's Own Factual Findings Contradicted His Award, His Award Should Be Sustained?

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1. Published Opinion dated, decided and filed May 12, 1994 from the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court. (Appendix A).
2. Unpublished Judgment dated January 21, 1993 from United States District Judge Bernard A. Friedman entered in favor of Defendant and against Plaintiff. (Appendix B)
3. Unpublished Order dated January 21, 1993 from United States District Judge Bernard A. Friedman denying Plaintiff's Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment and Denying Defendant's Motion for Attorneys' Fees and Costs. (Appendix B).

JURISDICTION

The judgment of the Sixth Circuit affirming the judgment of the District Court was entered on May 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Plaintiff brought this action pursuant to §301 of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a) which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

> *The Hospital . . . shall have the right to . . . establish work rules of conduct and fix and determine penalties for violation of such rules. . . .*
> *. . . [I]n the case of disciplinary action, he [the Arbitrator] shall have no power to substitute his judgment for that of the Hospital's as to the severity or degree of the penalty.*
>
> [Collective bargaining agreement, Article III, Section 2; Article VI, Section 4.]
>
> *Baum's proven offense, given the totality of circumstances, while it merits discipline, does not constitute just cause for discharge . . .*
> *The discharge of Charlotte Baum is reduced to a seven day suspension without pay.*
>
> [Opinion and Award of Arbitrator Michael P. Long.]

Petitioner brought this action to vacate an arbitration award after the Arbitrator clearly exceeded a bargained-for limitation on his power. Both the District Court and the Court of Appeals erred in failing to follow established precedent recognizing that where, as here, an arbitrator exercises a power he has been denied by a labor agreement, the award must be vacated.

The arbitration concerned the discharge of an employee, Charlotte Baum, for several acts of misconduct. The collective bargaining agreement granted the Hospital the sole and exclusive right to establish work rules and fix disciplinary penalties for employee misconduct. The Agreement specifically stated that it was "understocd that in the case of disciplinary action he [the Arbitrator] shall have no power to substitute his judgment for that of the Hospital's as to the severity or degree of the penalty."

The Arbitrator found that the Hospital had proven misconduct on the part of the grievant which "merit[ed]

discipline," but, in his opinion, discharge was too severe a penalty. In direct violation of a provision stating that he could not modify any disciplinary penalty, the Arbitrator modified the penalty of discharge by reducing it to a seven day suspension.

In its opinion, the Sixth Circuit did not address the effect of this limitation on the power of the Arbitrator. The Sixth Circuit only addressed the "just cause" provision of the contract, erroneously holding that the issue was whether the Arbitrator had "authority pursuant to the ***just cause provision*** of the Collective Bargaining Agreement to order Baum's reinstatement." 23 F.3d 1080, 1083 (6th Cir. 1994). The Sixth Circuit failed to follow a clear line of cases which hold that such an express limitation precludes an arbitrator from reducing the disciplinary penalty of discharge, *even where a just cause provision is present* in a collective bargaining agreement.

The Sixth Circuit's Opinion conflicts with its own decisions, those of other circuits and this Court. The Sixth Circuit's Opinion stands as a deviation from settled law, will cause confusion for future litigants, and stands to subvert the law of collective bargaining. A Writ of Certiorari is appropriate and necessary.

THE NATURE OF THE ACTION BELOW

1. District Court Proceedings

Petitioner filed this action on July 17, 1992, seeking an order vacating the July 10, 1992 opinion and award issued by Arbitrator Michael P. Long. Jurisdiction was founded upon Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. Cross Motions for Summary Judgment were filed.

On January 7, 1993, District Court Judge Bernard A. Friedman, heard oral arguments of the parties and issued an oral opinion from the bench denying Petitioner's

Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment. The District Judge stated that "the law in this Circuit is that the Arbitrator should be given all deference in terms of this case." The District Court held that it could not substitute its opinion or conclusions for that of the Arbitrator and that the Arbitrator had a right to determine whether or not "just cause" existed for the Grievant's discharge.

2. Appellate Proceedings

Petitioner timely appealed the District Court's judgment. On May 12, 1994, the United States Court of Appeals for the Sixth Circuit issued its Opinion and Judgment affirming the District Court. Like the District Court, the Court of Appeals focused on the just cause provision, ignoring the express limitation on the power of the Arbitrator to modify disciplinary penalties. The Court of Appeals held that it was "satisified, under the deferential standard of review set forth in ***Misco*** [***United Paper Workers Int'l Union v. Misco, Inc.***, 484 U.S. 29 (1987)] that the arbitrator reasonably interpreted the just cause provision as authorizing him to order the reinstatement of Baum." 23 F.3d at 1083.

STATEMENT OF FACTS

The grievant, Charlotte Baum, was employed at Mercy Memorial Hospital from May 21, 1977 until her discharge on December 23, 1987. The grievant was employed as a cook on the morning shift in the Hospital Dietary Department and served as union steward.

The Discharge

In November, 1987, the grievant was suspended for leaving the Hospital premises without permission during

her shift, tampering with time cards and asking other employees to punch her time card. After an investigation by the Hospital, the grievant was discharged on December 23, 1987. A letter of discharge set forth six grounds for her discharge: 1) tampering with time cards and ringing the time card of another employee; 2) misrepresentation of Hospital time records; 3) leaving Hospital premises during working hours without authorization; 4) asking and encouraging other employees to break Hospital rules; 5) intentionally providing false and misleading information to Hospital personnel during the disciplinary investigation and otherwise attempting to interfere with the investigation; and 6) repeatedly violating Hospital work rules.

The Arbitration

The grievant's discharge was arbitrated pursuant to the 1983-1985 collective bargaining agreement. The Arbitrator held that the grievant engaged only in the act of misconduct charged in item (4) above, asking and encouraging other employees to break the Hospital rules regarding the punching of time cards and leaving Hospital premises without authorization. Although the Arbitrator concluded that the Hospital did not establish the remainder of the charges, a review of the Arbitrator's factual findings showed that items (1), (5) and (6) were either explicitly or implicitly proven.

The Contract

The management rights clause contained in the labor agreement grants the Hospital the "sole and exclusive right to manage and operate the hospital . . . " The management rights clause also provides:

> The Hospital, in addition to the rights set forth in Section I above, shall have the right to promote, assign, transfer, suspend, discipline, discharge, layoff, and recall, to make and establish work rules of conduct and fix and determine penalties for violation of such rules, to maintain discipline and efficiency among employees, and to establish and assign contingent and/or temporary personnel; provided that such rights shall not be exercised by the Hospital in contravention of any of the express provisions of this agreement.

Under the arbitration provisions of the labor agreement, there are express limitations placed on the powers of labor arbitrators:

> *Section 4. Powers of the Arbitrator.* The Arbitrator shall have no power to add to, subtract from, alter or modify any of the terms of this Agreement or any of the functions or responsibilities of the parties to these agreements, or to substitute his judgment for that of either party, where said party has been given discretion by this Agreement.
>
> * * *
>
> He shall have no power to change any practice, policy or rule of the Hospital not in conflict with the express provisions of this Agreement nor shall he substitute his judgment for that of the Hospital as to the reasonableness of any such practice, policy or rule. His power shall be limited to deciding whether the Hospital has violated a specific Article and Section of this Agreement, it being understood that in the case of disciplinary action, he shall have no power to substitute his judgment for that of the Hospital's as to the severity or degree of the penalty.
>
> The Arbitrator shall not imply obligations or conditions binding upon the Hospital from this Agreement, it being understood that any matter

not specifically set forth herein, remains within the reserved right of the Hospital.

The Hospital published work rules, as authorized by the collective bargaining agreement, in the Mercy Memorial Employee Handbook. The handbook set forth certain numbered offenses which "will result" in immediate discharge. In addition, the handbook provided that other acts of misconduct, although not necessarily listed, could be grounds for immediate dismissal:

> The following acts are representative of misconduct which would be reason for immediate dismissal. Again, this is not intended to be an all-inclusive list, but rather are examples of misconduct that will result in immediate termination.
>
> * * *
>
> 3. Tampering with time cards or ringing the time card of another employee.
>
> * * *
>
> 10. Misrepresentation of Hospital Records (Falsifying information regarding the application blank, leave of absence, time records, sick leave or benefits or any other record of Mercy-Memorial Hospital).
>
> * * *
>
> 13. Leaving the Hospital premises during working hours without authorization.
>
> * * *
>
> 15. Repeated violation of rules.

The collective bargaining agreement also states that deliberate or material falsification of Hospital records shall constitute just cause for immediate discharge:

> After completion of the probationary period, no employee shall be discharged or suspended without just cause. Just cause for immediate discharge shall include such acts as: misappropriation of funds or theft; assault or

> attempted assault of a patient or personnel of the Hospital; being under the influence of alcohol or drinking alcohol on Hospital premises; illegal use of drugs or narcotics; deliberate or material falsification of Hospital records; or gross personal misconduct detrimental to patients.

The Work Rule Violations

As found by the Court of Appeals, the testimony at the hearing established that on November 2, 1987, the grievant asked another employee, Stella Richter, for a ride home from work. The grievant told Richter that they would have to leave before the scheduled end of their shift, but that Kathy Respondeck, another kitchen employee, would punch both of their time cards. After Richter declined to leave early, the grievant then asked Richter to punch her card at the end of the shift. The Arbitrator concluded:

> [I]t is found that the grievant is guilty of asking and encouraging other employees to break Hospital rules by suggesting to Stella Richter that she leave early and have another employee punch the grievant and her out. Grievant further encouraged her to break Hospital rules by requesting that she punch out Grievant's time card. [Opinion and Award of Arbitrator Michael Long, Appendix C at 45]

The Arbitrator found that the grievant encouraged another employee to leave the premises without permission and solicited time card fraud.

In addressing the Hospital's charge that the grievant's denial of this misconduct was a false statement, the Arbitrator cryptically concluded:

> That allegation [of providing false statements to management] is dependent upon the rest of the allegations being true and Baum's denials being

> false. There is inadequate proof and, therefore, no just cause for discipline. [Opinion and award of Arbitrator Michael Long, Appendix C at 49]

Petitioner asserted below that this conclusion makes no sense. The Arbitrator unmistakably found that the grievant asked an employee to leave work early without authorization and later asked another employee to punch her time card. When questioned by management, the grievant denied this and all other misconduct. To conclude that this denial was not a lie is utter nonsense and a logical impossibility. The grievant's denials were false and she provided false information to management. The Arbitrator's implicit, if not explicit, findings compel this conclusion.

The Arbitrator also found that another union employee, Sharon May, directly witnessed the grievant punch two time cards. The Arbitrator held that the proofs "at best demonstrate only that Baum punched a card, removed it from the time clock and punched another time card." Despite finding that the grievant punched two time cards, the Arbitrator surmised that there might be some potential other evidence – such as whose card was punched, whether this was simply a mistake and whether the card was later corrected. Based upon these "unanswered questions," the Arbitrator concluded that he could not "justify disciplinary action" for this work rule violation.

Finally, the Arbitrator decided that the Hospital did not have the right to implement discipline as a result of the grievant's cumulative work rule violations. The Arbitrator found that the grievant had engaged in at least twelve separate work rule violations prior to the events leading to her discharge. The work rules state that immediate discharge "will result" for "repeated violation of [work] rules." However, the Arbitrator substituted his

judgment for that of the Hospital and effectively rewrote the Agreement, stating:

> The employee's record, standing alone, does not simply justify further discipline. It can only be used in conjunction with another proven offense to aid the employer in determining if termination or behavior modification is in order and if it is, which behavior modification action is appropriate and to help justify the appropriate degree of discipline. [Opinion and Award of Arbitrator Michael P. Long, Appendix C at 51-52]

The Arbitrator's Reasoning

The labor agreement stated that "[t]he Arbitrator shall not imply obligations or conditions binding upon the Hospital from this Agreement." However, the Arbitrator reasoned that he had the implicit power under the labor agreement to modify disciplinary penalties. Even though the labor agreement stated the Arbitrator had "no power to add to, subtract from, alter or modify any of the terms of this Agreement" the Arbitrator did precisely this. The agreement clearly stated that the Arbitrator could not "substitute his judgment for that of either party, where said party has been given discretion by this Agreement." The agreement specifically gave the Hospital the sole discretion "to make and establish work rules of conduct and fix and determine penalties for violation of such rules." Despite these express limitations, the Arbitrator rejected the agreement of the parties and styled his own fashion of industrial justice.

In fact, the Arbitrator invented a new charge that was never leveled against the grievant, and proceeded to determine that the Hospital failed to prove this charge:

> Ms. Baum, through the totality of charges filed by the Employer, was really charged with being a ring leader of rule breaking and wrongful

> activities. She has not been proven to be a ring leader, and thus, is not guilty of the charges brought by the Employer. Baum's proven offense, given the totality of the circumstances, while it merits discipline, does not constitute just cause for discharge. [Opinion and Award of Arbitrator Michael P. Long, Appendix C at 60]

This intellectual slight of hand forms the basis of the Arbitrator's decision and rationale. The Arbitrator created an offense, held that the Hospital did not prove the offense that he alone created, and ignored the other proven offenses.

Despite this twisted logic, the Arbitrator found "proven offense[s]" which "merit[ed] discipline." As a result, he had "no power to substitute his judgment for that of the Hospital's as to the severity or degree of the [disciplinary] penalty."

In reviewing the Arbitrator's decision, both the District Court and the Court of Appeals took positions of extreme deference. Both courts refused to follow the unbroken line of precedent holding that where an arbitrator is denied a power under a collective bargaining agreement and proceeds to exercise that power, the award must be vacated. Review by this Court is now required.

REASONS FOR GRANTING THE PETITION

A. STANDARD OF REVIEW OF ARBITRATION AWARDS

This Court has held that labor arbitration is the preferred method for adjusting disputes arising over the interpretation or application of a collective bargaining agreement. See ***United Steelworkers v. American Mfg. Co.,*** 363 U.S. 564 (1960); ***United Steelworkers v. Enterprise Wheel and Car Corp.,*** 363 U.S. 593 (1960). As a

result, courts normally exercise deference to labor arbitration awards involving an interpretation or application of provisions of a labor agreement.

However, deference to labor arbitration does not preclude a court from reviewing or reversing an arbitrator's decision when an arbitrator exceeds the authority granted to him by a labor agreement. In the third of the three foregoing "***Steelworkers Trilogy***" cases on labor arbitration, this Court outlined the law which must control the evaluation of arbitrators' awards. In ***Enterprise Wheel and Car Corp.***, this Court held that an arbitrator is confined to the interpretation and application of the labor agreement and does not sit to "dispense his own brand of industrial justice." 363 U.S. at 597. An arbitrator's award must draw "its essence from the collective bargaining agreement." ***Id.*** at 597.

This exception to the general rule of deference to an arbitration award has been stated in a variety of ways. An arbitrator is confined to the interpretation and application of the collective bargaining agreement and, although he may construe ambiguous contract language, he may not disregard or modify plain and unambiguous provisions. ***Storer Broadcasting Co. v. American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO,*** 600 F. 2d 45, 47 (6th Cir. 1979). Where an award is fundamentally at odds with the collective bargaining agreement, an arbitrator's opinion and award will be reversed. ***Morgan Services v. Local 323,*** 724 F. 2d 1217, 1220 (6th Cir. 1984). As stated more succinctly, "[t]he arbitrator may not rewrite the labor contract." ***Mistletoe Express Service v. Motor Expressman's Union,*** 566 F. 2d 692, 695 (10th Cir. 1977).

Various Circuits have applied the foregoing standards in reversing the decisions of lower courts erroneously denying employers' motions to vacate arbitration awards which fail to draw their essence from the labor contract. See: ***Buckeye***

Cellulose Corp. v. District 65 Division 19 United Autoworkers, 689 F. 2d 629 (6th Cir. 1982) (lower court order enforcing arbitration award reversed where arbitrator exceeded authority under agreement in determining the penalty of discharge was excessive under the circumstances); ***International Brotherhood of Firemen and Oilers, AFL-CIO, Local 935-B v. The Nestle Company, Inc.,*** 630 F. 2d 474 (6th Cir. 1980) (lower court reversed where collective bargaining agreement stated that insubordination "shall" constitute cause for dismissal and arbitrator's opinion implicitly found insubordination); ***Detroit Coil Co. v. International Association of Machinists and Aerospace Workers, Lodge No. 82,*** 594 F. 2d 575 (6th Cir. 1979) (lower court's denial of application for vacation of arbitration award reversed where arbitrator failed to draw essence of award from agreement); ***Local 342, United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO v. TRW, Inc.,*** 402 F. 2d 727 (6th Cir. 1968) (judgment enforcing arbitration award reversed on appeal where employer had right to discharge employees upon finding that they engaged in work stoppage). See also ***S.D. Warren Co. v. United Paperworkers International Union, AFL-CIO, Local 1069,*** 845 F. 2d 3 (1st Cir. 1988); ***Georgia Pacific Corp. v. Local 27, United Paperworkers International Union,*** 864 F. 2d 940 (1st Cir. 1988); ***Monongahela Power Co. v. Local 2332, International Brotherhood of Electrical Workers,*** 566 F. 2d 1196 (4th Cir. 1976).

The most recent opinion of this Court on reversal of an arbitration award was set forth in the ***United Paper Workers Int'l Union v. Misco, Inc.,*** 484 U.S. 29 (1987). Although the arbitration award was upheld in ***Misco,*** this Court set forth the precise exception to the general rule which controls this case. Arbitration awards are not subject to review, unless, as here, the labor contract removes from the arbitrator the right to reduce the penalty of discharge for a proven offense:

> [T]he Arbitrator's award settling a dispute with respect to the interpretation or application of a

> labor agreement must draw its essence from the contract and cannot reflect the arbitrator's own notions of industrial justice . . . the parties, of course, may limit the discretion of the arbitrator . . . and it may be, as the Company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found.

484 U.S. at 38, 41.

The Sixth Circuit failed to recognize that this case fits within the precise language of *Misco*. Here, the Hospital and Union clearly and unambiguously limited the power of the Arbitrator. The labor agreement vested exclusive discretion in the Hospital to make rules and determine the severity or degree of disciplinary penalties. The contract clearly informed arbitrators that the severity or degree of a disciplinary penalty is a matter "within the unreviewable discretion of management." Under the agreement, the only issue for the arbitrator was whether a violation of the work rules occurred.[1]

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[1] Courts have reversed arbitrator awards where the award conflicts with express provisions of the labor agreement. See, ***Morgan Services v. Local 323***, 747 F. 2d 1217 (6th Cir. 1987) ("An arbitrator may not modify an employer's sanction for employee misconduct where a collective bargaining agreement clearly vest the power to determine appropriate measures with the employer."); ***Amanda Bent Bolt Co. v. International Union***, 451 F. 2d 1277 (6th Cir. 1972) (arbitrator's award vacated where striking workers were reinstated where the contract provided that striking would subject them to discharge); ***Detroit Coil v. International Ass'n of M. & A. Workers***, 594 F. 2d 575 (6th Cir. 1979) (arbitrator is confined to interpretation and application of collective bargaining agreement and does not sit to dispense his own brand of industrial justice); ***Buckeye Cellulose v. District 65, 19 UAW***, 689 F. 2d 629 (6th Cir. 1982) (arbitrator who found

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that employer did not violate the collective bargaining agreement when it disciplined an employee exceeded his authority under the agreement by determining the penalty of discharge was excessive under the circumstances); ***Timken Company v. Local No. 1123, United Steelworkers of America,*** 482 F. 2d 1012 (6th Cir. 1973) (arbitrator exceeded his authority by going outside the record to redefine the terms describing conduct warranting discharge where contract definition of such terms was unambiguous); ***Wright-Austin Co. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,*** 422 F. Supp. 1364 (E.D. Mich. 1976) (where contract provided that an employee would lose seniority status where he is absent for work for three consecutive days without notice or excuse, arbitrator's award reinstating the grievant and vacating his discharge was reversed since the arbitrator substituted his own sense of equity and fairness instead of applying the contract provisions); ***International Union of Operating Engineers, Local 670 v. Kerr-McGee Refining Corp.,*** 618 F. 2d 657 (10th Cir. 1980) (where a contract expressly provided for discharge for abuse or misuse of sick leave benefits or false statements, and an arbitrator found such misconduct, arbitrator lacked authority to require proof of excessive absenteeism before ordering discharge); ***Mistletoe Express Service v. Motor Expressmen's Union,*** 566 F. 2d 692 (10th Cir. 1977) (where a contract expressly provided that certain conduct was "just cause" for discharge and such conduct occurred, arbitrator improperly rewrote the contract by ruling the conduct was just cause for discipline, but not for discharge); see also ***Memphis District of Browning Ferris Industries of Tennessee v. Teamster Local No. 984,*** 785 F. Supp. 104 (W.D. Tenn.), *aff'd.* 946 F. 2d 895 (6th Cir. 1991) (where labor contract stated arbitrator "shall have no power to substitute his judgment for that of management," arbitrator exceeded authority by reinstating grievant who was guilty of theft even though the theft involved was not company-related property).

B. THE COURT OF APPEALS COMMITTED CLEAR ERROR AND DEPARTED FROM ESTABLISHED PRECEDENT BY HOLDING THAT BASED ON A STANDARD "JUST CAUSE" PROVISION THE ARBITRATOR WAS FREE TO EXCEED AN EXPRESS LIMITATION ON HIS AUTHORITY CONCERNING MODIFICATION OF PENALTIES FOR DISCIPLINE

The issue presented to the Sixth Circuit was whether under Article VI, Section 4 of the collective bargaining agreement the Arbitrator was deprived of the power to modify the discipline imposed by the Hospital. Rather than resolving this issue, the Sixth Circuit misstated the Hospital's position as follows:

> The Hospital contends that the Arbitrator did not have authority pursuant to the just cause provision of the collective bargaining agreement to order Baum's reinstatement.

23 F. 3d at 1083.

The Hospital did not contend that the Arbitrator's power was limited by the just cause provision. The Hospital contended that the Arbitrator's power was limited by Article VI, Section 4 of the collective bargaining agreement, "Powers of the Arbitrator."

Despite the clear limitation in the agreement stating that the Arbitrator "shall have no power to substitute his judgment for that of the Hospital's as to the severity or degree of [disciplinary] penalty," the Sixth Circuit made this clearly erroneous finding:

> There is no provision in the agreement precluding this interpretation of the arbitrator's authority to order reinstatement pursuant to the just cause provision.

23 F. 3d at 1083.

This finding is simply wrong. Article VI, Section 4 of the Agreement precluded the Arbitrator's authority from reinstating a discharged employee after finding that misconduct occurred which merited discipline.

The Sixth Circuit never addressed the express limitation on the power of the Arbitrator concerning modification of disciplinary penalties; never addressed the management rights clause giving the Hospital the exclusive right to fix and determine disciplinary penalties; and never addressed the section of the agreement which stated that an Arbitrator could not alter or modify the agreement nor imply any obligations which were not expressly stated.

Not surprisingly, after having misidentified the issue presented and after failing to recognize the express limitation on the Arbitrator's power under Article VI, Section 4, the Sixth Circuit upheld the arbitration award.

The Sixth Circuit's opinion directly conflicts with its prior opinions which reversed arbitration awards where the arbitrator exceeded an express limitation on his power. See ***Dobbs, Inc. v. Local 614 Int'l Brotherhood of Teamsters,*** 813 F. 2d 85, 86 (6th Cir. 1987); ***Buckeye Cellulose Corp. v. District 65 Division 19 United Auto Workers,*** 689 F. 2d 629 (6th Cir. 1982); ***Int'l Brotherhood of Firemen and Oilers, AFL-CIO, Local 935-D v. Nestle Co., Inc.,*** 630 F. 2d 474 (6th Cir. 1980); ***Detroit Coil Co. v. Int'l Ass'n. of Machinists and Aerospace Workers, Lodge No. 82,*** 594 F. 2d 575 (6th Cir. 1979); ***Local 342, United Automobile, Aerospace and Agricultural Implement Workers, AFL-CIO v. TRW, Inc.,*** 402 F. 2d 727 (6th Cir. 1968); ***Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board, Amalgamated Clothing and Textile Workers' Union, AFL-CIO,*** 724 F. 2d 1217 (6th Cir. 1984); ***Storer Broadcasting Co. v. American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO,*** 600 F. 2d 45 (6th Cir. 1979).

In its opinion, the Sixth Circuit relied heavily on the "just cause" provision of the labor agreement and held that the Arbitrator had the right to modify the disciplinary penalty in this case. In so ruling, the Sixth Circuit's opinion directly conflicted with its opinion in ***Magnavox Co. of Tenn. v. Int'l Union of Electrical, Radio and Machine Workers, AFL-CIO***, 410 F. 2d 388 (6th Cir. 1969). In addition, the Sixth Circuit's decision conflicted with the Eighth Circuit's opinion in ***Truck Drivers and Helpers Union Local 784 v. Ulry-Talbert Co.***, 330 F. 2d 562 (8th Cir. 1964).

In both of these cases, the courts reversed the arbitrators since they exceeded the authority granted to them under the collective bargaining agreement. The courts held the arbitrators had no authority under the agreements to modify the disciplines in question, even though there were just cause provisions in both agreements. See also, ***Florida Telephone Corp. v. Communications Workers of America***, 475 F. Supp. 213 (N.D. Fla. 1979); ***General Drivers, Warehousemen and Helpers, Local 89 v. Hays & Nicoulin, Inc.***, 594 F. 2d 1093 (6th Cir. 1979). Here, based on the same facts the Sixth Circuit reached the opposite result.

In ***Magnavox,*** the labor agreement contained both a just cause provision and a limitation on the power of the arbitrator which was similar to, but not as strongly worded as, the limitation in the labor agreement in this case. The contract stated:

> An arbitrator under this Agreement shall not have the right to: a) Alter or amend any provision of this contract or add to or subtract from it; b) Substitute his judgment for the employer's in matters which are solely management's functions and rights under this contract; c) To consider, rule, or enter any award with respect to disciplinary action imposed upon an employee for refusal or failure to perform assigned job tasks, except where the

> employee can positively establish that the performance of such tasks would have created a serious health hazard to him.

See 287 F. Supp. at 49.

In addition, the labor agreement provided that management had "the right to hire, layoff and discharge employees for just and lawful cause." The arbitrator reinstated a discharged employee after finding that the employee refused to perform a task which did not create a hazard to his health. Notwithstanding the just cause provision, the Sixth Circuit rejected the arbitrator's conclusion that he could mitigate the punishment of discharge:

> We read such a conclusion to be that, notwithstanding the unambiguous language of the contract which restricted the arbitrator's jurisdiction and forbade his making an award in the particular facts of this case, he had some general authority to take the action he did. We disagree. The right of the company to do what it did was clearly spelled out in Article IX, Section 2(c) of the contract. Whatever general authority the arbitrator may have was restricted and confined by such a provision.

410 F. 2d at 389.

In this case, as in ***Magnavox***, the Arbitrator was restricted from entering any award with respect to the disciplinary penalty. Notwithstanding this restriction, the Arbitrator modified the disciplinary penalty for Charlotte Baum despite finding that her misconduct merited discipline.

The similarities between the Eighth Circuit's decision in ***Ulry-Talbert*** and this case are striking. Both collective bargaining agreements provided that employees could be discharged only for "proper cause" (330 F. 2d at 563) or "just cause." In this case, the Arbitrator stated that "Baum's proven offense . . . merits discipline. . . . " In ***Ulry-Talbert***, the arbitrator stated that the grievant engaged in "conduct which justified discipline to him as an employee." 330 F. 2d at 563.

In this case, Arbitrator Long stated that the proven offense "while it merits discipline, does not constitute just cause for discharge." In ***Ulry-Talbert,*** the arbitrator stated that the "discharge was an excessive penalty for said misconduct." 330 F. 2d at 563.

In both ***Ulry-Talbert*** and in this case, the collective bargaining agreements expressly stated, in nearly identical language, that the arbitrator shall not "substitute . . . judgment for that of the [employer]" as to the disciplinary penalty. 330 F. 2d 564.

The holding in ***Ulry-Talbert*** directly conflicts with the Sixth Circuit's opinion in the case, based on virtually the same facts. The Eighth Circuit held:

> The arbitration clause in the agreement between the parties is narrowly drawn. It appears to be the clear intendment of the agreement that in the event of the discharge of an employee by the employer, the arbitrator is forbidden to substitute his judgment for that of the employer.
>
> * * *
>
> It was no part of the arbitrator's duty to assess the penalty to be imposed for misconduct.

330 F. 2d at 564-565.

Likewise the similarities between this case and ***Florida Telephone Corp.*** are striking. Exactly as here, the contract contained a "just cause" provision that stated that "the arbitrator shall not substitute his judgment for that of management" in reviewing disciplinary action. The arbitrator nonetheless reduced the grievant's discipline from a discharge to a suspension, exactly as in this case. The district court summarily reversed, holding that the agreement specifically denied the arbitrator the authority to substitute his judgment of discipline for that of the company:

> In the present case, the arbitrator construed a section of the collective bargaining agreement in a manner which allowed him to review and modify

> the disciplinary measures taken by the company against an employee. Conspicuously absent from this interpretation, is any mention or consideration of the section of the agreement specifically denying him authority in disciplinary proceedings to substitute his judgment for that of the company. While it may be true that, generally, the arbitrator is authorized to review the reasonableness of a company's disciplinary action against its employees, when the collective bargaining agreement so clearly and unequivocably places the discretion solely and exclusively in the company, that general rule cannot apply.

475 F. Supp. at 216.

Here, the Sixth Circuit looked solely to the just cause provision and followed the general rule that an arbitrator is authorized to review the reasonableness of disciplinary action. While this may be the general rule, it is inapplicable in this case because the collective bargaining agreement denied the Arbitrator precisely this authority.

The Sixth Circuit decision in ***Hays & Nicoulin*** is instructive. There, the labor contract provided that the employer was to be the "sole judge" of an employee's qualifications and ability. The Sixth Circuit held that the arbitrator could not "substitute his judgment" for that of the employer as to employees' qualifications for work:

> Rather, the governing provision is §1.8 which states that the Company is to be the sole judge of employees' qualifications and tenure. By substituting his judgment of the discharged employee's fitness for that of the Company, the arbitrator exceeded his authority under the collective bargaining agreement. This construction of the contract, therefore, did not draw "its essence from the collective bargaining agreement." [Citation omitted.][2]

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[2] See also, ***Morgan Services, Inc. v. Local 323***, 724 F. 2d 1217 (6th Cir. 1984) (contract provided that employees proven guilty

594 F. 2d at 1094.

In this case, in affirming the judgment of the District Court, the Sixth Circuit never addressed any of the foregoing authority. Instead, the Sixth Circuit misapplied its prior decision in ***Eberhard Foods, Inc. v. Handy,*** 868 F. 2d 890 (6th Cir. 1989). The court stated:

> We are satisfied, under the deferential standard of review set forth in ***Misco, supra,*** that the arbitrator reasonably interpreted the just cause provision as authorizing him to order the reinstatement of Baum. ***Eberhard Foods, Inc. v. Handy,*** 868 F. 2d 890, 892-93 (6th Cir. 1989).

23 F. 3d at 1083.

A review of the decision in ***Eberhard Foods*** shows that its holding does not apply to this case. In ***Eberhard Foods*** there was no contractual limitation on the authority of the arbitrator to revisit or modify the disciplinary penalty. In fact, the Sixth Circuit expressly relied on the absence of such a provision in upholding the award:

> As ***Misco, supra,*** teaches, it is the language of the CBA and the arbitrator's own construction thereof, which determines the scope of the arbitrator's authority.
>
> * * *
>
> There is nothing, therefore, in the CBA or work rules which expressly limits or removes from the

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of insubordination would be discharged "without redress" and upon finding that the grievant was implicitly guilty of insubordination arbitrator could not reduce the grievant's discipline based on notions of progressive discipline); ***Dobbs, Inc. v. Local 614, Int'l Brotherhood of Teamsters,*** 813 F. 2d 85 (6th Cir. 1987) (labor contract permitted the company to fire an employee for third offense of habitual tardiness and, despite just cause provision, the arbitrator could not reduce the grievant's discharge for violation of the tardiness rule).

> arbitrator the authority to review the remedy in this case.
>
> * * *
>
> Again, the question is whether the language of the contract at hand is sufficiently clear so as to deny the arbitrator the authority to interpret the agreement as he did, i.e., to interpret the agreement to permit arbitration of the fairness of the remedy, once a violation of the work rules is found. In this case, the language of the CBA does not preclude such authority. (Emphasis added).

868 F. 2d at 892-893.

Thus, the holding in ***Eberhard Foods*** expressly recognizes that in cases like this – where the labor agreement expressly limits or removes from the arbitrator the authority to modify the disciplinary penalty, yet the arbitrator does so anyway – an arbitrator's award must be reversed. ***Eberhard Foods*** expressly recognized that it was not dealing with a labor contract like the one in this case.

Thus, the Sixth Circuit's reliance on ***Eberhard Foods*** was completely misplaced. If in fact the appeals court had followed ***Eberhard Foods,*** the Arbitrator's award would have been vacated.

The Sixth Circuit rejected its own holdings in ***Magnavox, Hays & Nicoulin*** and its implicit holding in ***Eberhard Foods.*** Further, the decision is directly in conflict with the Eighth Circuit's decision in ***Ulry-Talbert,*** which was cited with approval and relied upon by the Sixth Circuit in ***Magnavox.*** The decision in this case also stands in stark contrast to ***Misco*** and ***Steelworkers Trilogy.*** An arbitrator's opinion must be reversed where he exceeds an express limitation of his power set forth in the labor agreement. Even if a general just cause provision is present, if there is specific language in the agreement limiting the arbitrator's authority to review the disciplinary measure, the arbitrator is without such authority.

In this case, the Arbitrator was limited to a determination whether or not the employee engaged in the charged misconduct. Once that determination was made, even if a "just cause" provision was present, the arbitrator simply could not change the penalty under the parties' agreement. See ***Magnavox, Hays & Nicoulin, Ulry-Talbert, Florida Telephone.*** This rule is precisely consistent with this Court's statement in ***Misco*** that the parties to a labor agreement are free to limit the discretion of the arbitrator and keep it "within the unreviewable discretion of management to discharge an employee once a violation [of a work rule is] found." 484 U.S. at 41.

The decision of the district court in ***Copaz Packing Co. v. United Food and Commercial Workers, Local 7A,*** 591 F. Supp. 1502 (S.D. Ohio 1984), shows how the two provisions at issue here – the just cause provision and provision limiting the power of the arbitrator – must be read and applied:

> We would also reject the argument that the just cause provision somehow overrides or qualifies the specified penalty provision, and therefore vests the arbitrator with the broad discretion attendant to a just cause provision standing alone. We think the only reasonable construction of the two provisions is that the specific penalty provision qualifies the general just cause provision, and thereby removes considerations of appropriate penalty for harassment from the just cause analysis. Alternatively stated, the specific penalty provision removes the appropriateness of the sanction issue form the arbitrator's broad discretion under the just cause provision. Therefore, having concluded that the grievant committed acts of harassment and intimidation, the arbitrator was without authority under the CBA and SSA to pass on the appropriateness of the penalty.

591 F. Supp. at 1506.

Similarly, in ***Butterkrust Bakeries v. Bakery, Confectionery and Tobacco Workers Int'l Union,*** 726 F. 2d 698 (11th Cir. 1984), the terms of the agreement provided the employer was to retain sole control over employee discipline, subject only to just cause. As a result, the court held an arbitrator could not reinstate an employee once the arbitrator found a work rule violation had occurred:

> Therefore, because the collective bargaining agreement in this case reposed sole control over employee discipline in Butterkrust and expressly prohibited modification of its terms, once the arbitrator found the prerequisite for discharge to be present, his authority over the matter ceased. He had no power to reinstate Woodard under any condition.

726 F. 2d at 700.

Here, the parties specifically agreed that the arbitrator would be without authority to pass on the appropriateness of the penalty. This was a power the arbitrator did not have and under settled law the lower court should be reversed and the arbitration award should be vacated.[3]

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[3] See also ***Morgan Services, Inc., supra,*** (where a contract carries specific penalty provision, arbitrator "was without power to modify the company's sanction."); ***Int'l Brotherhood of Electrical Workers, Local 429 v. Toshiba America, Inc.,*** 879 F. 2d 208 (6th Cir. 1989) (where a contract provided that an employee who violated no strike clause would be subject to immediate discharge, arbitrator could not reinstate employee guilty of such violation); ***Local 342, The United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO v. TRW, Inc.,*** 402 F. 2d 727 (6th Cir. 1968) (where an employer had the right under agreement to take "disciplinary action including discharge" against any employee who violated the no strike provision, arbitrator was not empowered under the "just cause" provision to reinstate employees in light of the mandatory penalty); ***Georgia Pacific Corp. v. Local 27, United Paperworkers Int'l Union,*** 864 F. 2d 940 (1st Cir. 1988) (where a

This Petition is grounded in the recognized labor law doctrine that management may retain the inherent right to manage, which includes the prerogative to discipline and discharge employees. This inherent right is only abdicated through the collective bargaining process. If the parties to a collective bargaining agreement intend to reverse this traditional understanding, they must do so by express clear language divesting the employer of this right. The parties here, have done just the opposite: they expressly reserved to the employer the right of discretion in establishing work rules, selecting the level of discipline for violation of those rules, and fixing the severity or degree of the penalty. The parties' agreement also insures that these rights are not to be

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contract provided for immediate discharge in cases of dishonesty arbitrator could not utilize "just cause" analysis in reinstating employee guilty of dishonesty); ***International Brotherhood of Electrical Workers, Local No. 1377 v. Leece Neville Division, Sheller-Globe Corp.,*** 550 F. Supp. 1071 (N.D. Ohio 1982) (arbitrator who found grievants guilty of stealing exceeded his authority by not adhering to agreement which provided that employees be discharged for that offense, even though agreement also contained just cause provision); ***Wright-Austin Company v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,*** 422 F. Supp. 1364 (E.D. Mich 1976) (where agreement provided that employee would lose seniority status where he is absent without notification for three days and the arbitrator found that the grievant did not report or notify the company for three days, the arbitrator had no authority to reinstate the employee, even though the contract contained a just cause provision); ***Textile Workers Union of America, AFL-CIO Local No. 1386 v. American Thread Company,*** 291 F. 2d 894 (4th Cir. 1961) (where contract provided that employees would be discharged only for just cause, and just cause included the failure of the employee to perform his job in accordance with the company standards, the arbitrator's finding that employee was guilty of a serious offense resulted in an implicit finding that just cause existed and the arbitrator was without authority to modify the employee's discharge).

diminished by an arbitrator by expressly precluding any arbitrator from reviewing or substituting his or her judgment as to the severity of any disciplinary penalty issued by management.

The agreement of the parties denied Arbitrator Long the authority to reduce the grievant's discharge with unmistakable clarity in a cascade of plain language. As stated by the first Circuit, "it is difficult for 'one to imagine how one could use the English language more clearly'." ***Georgia Pacific Corp v. Local 27 United Paperworkers Int'l Union,*** 864 F. 2d 940, 946 (1st Cir. 1988). The Arbitrator's decision, as upheld by the Sixth Circuit destroys this agreement of the parties.

Unless this Petition is granted, Petitioner will be stripped of a right it obtained at the bargaining table. The lower court's decision means that a generalized just cause provision voids a specific limitation on the power of the arbitrator. Under the Sixth Circuit's decision, the section concerning limitation on the power of the arbitrator contained in the parties' agreement has no meaning whatsoever. Such a result is totally at odds with long standing labor law jurisprudence developed by this Court.

C. THE LOWER COURT ERRED AND FAILED TO FOLLOW ITS PRIOR DECISIONS BY REFUSING TO VACATE THE ARBITRATOR'S AWARD BASED ON IMPLICIT FINDINGS THAT THE GRIEVANT PUNCHED ANOTHER EMPLOYEE'S TIME CARD, LIED TO MANAGEMENT AND ENGAGED IN REPEATED VIOLATIONS OF THE WORK RULES

Where an arbitrator's factual finding shows by implication that a grievant engaged in misconduct which gives rise to the exclusive right in management to select a penalty, the arbitrator may not substitute his judgment for that of management and reduce or modify the penalty. See ***Morgan Services, Inc. v. Local 323, Chicago and Central States Joint***

Board, Amalgamated Clothing and Textile Workers' Union, AFL-CIO, 724 F. 2d 1217 (6th Cir. 1984); ***Textile Workers Union of America, AFL-CIO Local No. 1386 v. American Thread Company,*** 291 F. 2d 896 (4th Cir. 1961).

Similarly, where an arbitrator's opinion finds no factual support in the established record, it can be reversed and set aside by the court. For example, in ***Storer Broadcasting Co. v. American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO,*** 600 F. 2d 45 (6th Cir. 1979), the court held that where there was no evidentiary support in the record for the arbitrator's finding that the union had made certain communications to its members, the court must set aside the arbitrator's award. The court held that where the arbitrator's finding was based merely on his own personal view, and there was no evidence to support his conclusion, his award must be vacated. See also ***Detroit Coil Co. v. International Association of Machinists and Aerospace Workers, Lodge No. 82,*** 594 F. 2d 575, 580-81 (6th Cir. 1979); ***N.F.M. Corp. v. United Steelworkers of America,*** 524 F. 2d 756 (3rd Cir. 1975); ***Timken Co. v. Union Local No. 1123 United Steelworkers of America,*** 482 F. 2d 1012, 1014-15 (6th Cir. 1973).

Here, the Arbitrator explicitly found that the grievant removed a card from the time card rack, punched it, put it back, removed a second card from the time card rack, punched that card and also put it back. A clearer factual finding of punching another employee's time card in direct violation of the established work rules could not be made. The Arbitrator's speculation and supposition that the Hospital did not show whose time card was punched, whether there was a mistake, or whether the punched time card was later corrected, are totally irrelevant to his finding that there was a violation of this simple and unambiguous work rule. His own personal views concerning this proven offense did not empower him to ignore the express language of the

contract, the clear and unambiguous work rules, and Hospital's unreviewable right to immediately discharge the grievant for engaging in this misconduct.

Similarly, if not explicitly contained in his decision, it is an unavoidable conclusion that the grievant lied to management representatives in denying the proven events of November 2, 1987 and in denying that she ever punched two time cards, whether mistakenly or not, as witnessed by Sharon May. Given the Arbitrator's factual findings that the grievant reached an agreement with Kathy Respondeck to punch her time card, asked Stella Richter to punch her time card, asked Stella Richter to leave early on November 2, 1987, and did, in fact, punch two time cards (whether mistakenly or not), the grievant's false denials of this misconduct constitutes another cause for discharge. Under the collective bargaining agreement and the work rules, the Arbitrator had no authority to modify the discipline. See also ***Delta Queen Steamboat Co. v. District Two, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL-CIO,*** 889 F. 2d 599 (5th Cir. 1989) (based upon arbitrator's actual findings, the judge implicitly found proper cause for discipline and discharge); ***Container Products Inc. v. United Steelworkers of America,*** 873 F. 2d 818 (5th Cir. 1989) (should the arbitrator "implicitly find" that proper cause exists, he need not recite the operative phrase, "proper cause").

Finally, the Arbitrator simply chose to ignore the grievant's prior work rule violations. Although he blithely characterized her work record as "improving," there is nothing in the contract which allowed him to completely discount twelve separate items of prior discipline for work rule violations. The Arbitrator's factual finding of the proven acts of misconduct together with the prior violations provided an unassailable basis for Hospital to discharge the grievant. The

Arbitrator had no authority to modify, second-guess or substitute his judgment for this discharge.

In affirming the arbitration decision, the Court of Appeals decision is in conflict with the foregoing precedent. This Court, as the court of last resort, should rectify the aberrant decision of the court below by granting this Petition.

CONCLUSION

Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted and that upon a hearing on the merits the judgment and opinion of the Sixth Circuit be vacated and reversed.

Respectfully submitted,

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Dated: August 8, 1994

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0148P (6th Cir.)
File Name: 94a0148p.06

No. 93-1183

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MERCY MEMORIAL HOSPITAL CORPORATION, *Appellant,* *v.* HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, *Appellee.*	)	ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed May 12, 1994

Before: MILBURN and GUY, Circuit Judges; and TIMBERS, Senior Circuit Judge*.

TIMBERS, Senior Circuit Judge. Appellant Mercy Memorial Hospital Corporation (Hospital) appeals from a judgment entered in the Eastern District of Michigan,

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*Honorable William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

Bernard A. Friedman, District Judge, denying the Hospital's summary judgment motion, granting the summary judgment motion of appellee Hospital Employees' Division of Local 79 (Local 79), and denying Local 79's motion for attorneys' fees and costs. The judgment affirmed a decision by Arbitrator Michael P. Long, which required the Hospital to reinstate Charlotte Baum as an employee.

The Hospital contends (1) that the arbitrator exceeded his authority pursuant to the collective bargaining agreement in ordering the reinstatement of Baum, and (2) that the arbitrator made erroneous factual findings in determining that Baum was improperly discharged.

We affirm.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Charlotte Baum was a union steward and cook at the Hospital where she began working in 1977. In November 1987, Baum was suspended for leaving the Hospital premises without permission during her shift, tampering with time cards, and asking other employees to punch her time card. After an investigation by Hospital personnel, Baum was discharged in December 1987 for various alleged violations of Hospital rules. Her letter of discharge set forth six grounds for discharge: (1) tampering with time cards and ringing the time card of another employee; (2) misrepresentation of Hospital time records;

(3) leaving Hospital premises during work hours without authorization; (4) asking and encouraging other employees to break Hospital rules; (5) intentionally providing false and misleading information to Hospital personnel during the disciplinary investigation and otherwise attempting to interfere with the investigation; and (6) repeatedly violating Hospital work rules.

Local 79 and the Hospital agreed to arbitrate Baum's discharge grievance pursuant to their collective bargaining agreement (the agreement). In addition to providing for arbitration, the agreement provides for the disciplining and discharge of Hospital employees. Article III, section 2, of the agreement states that the Hospital has the right "to make and establish work rules of conduct and fix and determine penalties for violation of such rules, . . . provided that such right[] shall not be exercised by the Hospital in contravention of any of the express provisions of this [a]greement". Article VI, section 4, states that the arbitrator "shall have no power to substitute his judgment for that of the Hospital's as to the severity or degree of the penalty". Article VIII, section 1, states:

> "After completion of the probationary period, *no employee shall be discharged or suspended without just cause.* Just cause for immediate discharge shall include such acts as: misappropriation of funds or thefts; assault or attempted assault of a patient or personnel of the Hospital; being under the influence of alcohol or drinking alcohol on Hospital premises; illegal use of drugs or narcotics; deliberate and material falsification of Hospital records; or

> gross personal misconduct detrimental to patients." (emphasis added).

The Hospital Employee Handbook also sets forth grounds for immediate discharge. These include tampering with time cards, misrepresentation of Hospital records, leaving the premises during work hours without authorization, and repeated violations of the rules. The Handbook states that these violations are merely representative of conduct warranting immediate dismissal and that the list is not all-inclusive.

The arbitrator received testimony on eleven days between March and September 1991. In his decision dated July 9, 1991, he found that the Hospital had proven only the charge that Baum asked and encouraged other employees to violate Hospital rules. The testimony at the hearing established that on November 2, 1987 Baum asked Stella Richter, a fellow employee, for a ride home from work. Baum told Richter that they would have to leave before the end of their shift, but that Kathy Respondeck, another kitchen employee, would punch both of their time cards. After Richter declined to leave early, Baum asked Richter to punch her card at the end of the shift. Based on these facts, the arbitrator found that Baum had encouraged other employees to violate Hospital rules. He also found that these facts did not prove that Baum actually left the Hospital before the end of her shift.

The arbitrator also found that the Hospital had not proven that Baum tampered with another employee's time card. Sharon May testified that she saw Baum take a time card from the rack, punch it, put it back, and then remove

and punch a second time card. The arbitrator found that this did not prove that Baum had tampered with another employee's time card. He found that this testimony proved only that Baum punched two time cards.

The arbitrator concluded that discharge was inappropriate and ordered that Baum be reinstated after a seven day suspension. He also concluded that the act of encouraging another employee to violate Hospital rules merited discipline, but that such act was not just cause for discharge as required by the collective bargaining agreement.

The Hospital then sought to vacate the arbitration award in the district court pursuant to 29 U.S.C. § 185(a) (1988). It alleged that the arbitrator did not have the authority pursuant to the collective bargaining agreement to order reinstatement. Both sides moved for summary judgment. Local 79 also moved for attorneys' fees and costs. On January 7, 1993, the court held a hearing on the parties' motions for summary judgment. At the close of the hearing, the court announced an oral order affirming the arbitrator's decision. On January 21, 1993, the court entered judgment denying the hospital's summary judgment motion, granting Local 79's summary judgment motion, and denying Local 79's motion for attorneys' fees and costs.

II.

(A) ARBITRATOR'S AUTHORITY TO ORDER REINSTATEMENT

The Hospital contends that the arbitrator did not have authority pursuant to the just cause provision of the

collective bargaining agreement to order Baum's reinstatement. She did not commit an act for which discharge was expressly provided. The Hospital relies on Article III, section 2 and Article VI, section 4, of the agreement in support of its claim that it had the exclusive right to set disciplinary penalties, including discharge, for any violation of a work rule. The Hospital asserts that, once the arbitrator found that Baum had committed an act meriting discipline, the Hospital had just cause to discharge her. We disagree.

"The standard of review in arbitration cases is very narrow." *Anaconda Co. v. District Lodge No. 27, Int'l Ass'n of Machinists & Aerospace Workers*, 693 F.2d 35, 36 (6 Cir. 1982) (per curiam). An arbitrator's decision is proper if it "draws its essence from the collective bargaining agreement" and is not merely the arbitrator's "own brand of industrial justice". *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). This is "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge" and thus "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept". *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38.

Encouraging another employee to violate a Hospital rule is not enumerated in the agreement or in the

employee handbook as just cause for immediate discharge. The agreement and the handbook, however, provide that the acts enumerated as providing just cause are nonexclusive and that similar acts also may constitute just cause for discharge. This allows for two interpretations of the just cause provision.

The first interpretation, which the Hospital urges us to adopt, would establish just cause for discharge once the arbitrator finds that the grievant committed *any* violation meriting discipline. This would relegate the arbitrator to a mere fact-finder and would preclude him from determining whether an unenumerated violation provides just cause for discharge.

The second interpretation, which was adopted by the arbitrator, would mean that the arbitrator has the authority to determine whether unenumerated acts of misconduct constitute just cause for discharge. There is no provision in the agreement precluding this interpretation of the arbitrator's authority to order reinstatement pursuant to the just cause provision. Since this is a reasonable interpretation of the just cause provision, we believe that the arbitrator's reinstatement award "rationally derived from the terms of the agreement". *Dobbs, Inc. v. Local 614, Int'l Bhd. of Teamsters,* 813 F.2d 85, 86 (6 Cir. 1987); *see also Retail Clerks Union Local No. 1557 v. Murfreesboro Vending Serv., Inc.*, 689 F.2d 623, 626 (6 Cir. 1982) (per curiam) (arbitrator's decision need be a permissible interpretation, not the best interpretation, of the collective bargaining agreement). We are satisfied, under the deferential standard of review set forth in *Misco, supra,* that the arbitrator reasonably interpreted the just cause provision as authorizing him to order the reinstatement

of Baum. *Eberhard Foods, Inc. v. Handy,* 868 F.2d 890, 892-93 (6 Cir. 1989).

We agree with the arbitrator's decision that he was authorized to award reinstatement of Baum.

(B) ARBITRATOR'S FACTUAL FINDINGS

The Hospital also challenges the arbitrator's factual findings in connection with his decision that discharge was inappropriate. The Hospital contends that the evidence proved (1) that Baum tampered with another employee's time card and (2) that Baum provided Hospital personnel with misleading information. The Hospital asserts that the arbitrator erred in ordering reinstatement since such acts are listed as just cause grounds for discharge. The arbitrator found that the Hospital failed to prove that Baum had committed the alleged violations of Hospital rules. Specifically, the arbitrator found that Sharon May's testimony did not prove that Baum punched the time card of another employee, since May could not identify whose card Baum had punched. The arbitrator also found that the Hospital failed to prove that Baum provided it with misleading information, since the Hospital failed to prove the underlying offenses in connection with which Baum was accused of providing misleading information. Although we might have reached a contrary conclusion based on the evidence, we are satisfied that the record sufficiently supports the arbitrator's factual findings. *Storer Broadcasting Co. v. American Fed'n of Television & Radio Artists,* 600 F.2d 45, 47 (6 Cir. 1979).

The Hospital further contends that there is nothing in the agreement to support the arbitrator's decision that Baum's history of the rule violations did not merit discharge. The arbitrator found that the agreement and the employee handbook set a policy of corrective/progressive disciplinary procedures for employees who violate Hospital rules. The arbitrator found that Baum never had been suspended nor had her pay docked for her prior infractions. He also found that Baum's disciplinary record showed much improvement over the two years preceding her discharge and that employees who committed similar infractions had not been discharged. In light of these facts, the arbitrator concluded that discharge was inappropriate. We believe that the arbitrator properly interpreted the corrective/progressive disciplinary procedure set forth in determining that discharge was inappropriate under these circumstances. *Misco, supra,* 484 U.S. at 38.

We agree with the arbitrator's decision that Baum's discharge was inappropriate on the facts of this case.

III.

To summarize:

The arbitrator correctly found that the just cause provision in the collective bargaining agreement authorized him to award reinstatement of Baum. He also correctly found that her discharge was inappropriate on the facts of this case.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERCY MEMORIAL HOSPITAL CORPORATION,

Plaintiff,

vs.

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Defendants.
_____/

Civil Action No. 92-CV-74901

HON. BERNARD A. FRIEDMAN

JUDGMENT

IT IS ORDERED AND ADJUDGED that a judgment is entered in favor of defendant and against plaintiff, the court having issued an order granting summary judgment in favor of defendant on JAN 21 1993.

APPROVED:

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: JAN 21 1993
Detroit, Michigan

JOHN P. MAYER
CLERK OF THE COURT

By /s/ Judie M. Birdsall
Judie M. Birdsall
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERCY MEMORIAL HOSPITAL CORPORATION,

Plaintiff,

vs.

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Defendants.

_____/

Civil Action No. 92-CV-74901-

HON. BERNARD A. FRIEDMAN

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
and
ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
and
ORDER DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS

On January 7, 1993, this matter was before the court on plaintiff's motion for summary judgment, filed November 4, 1992, and on Defendants' motion for summary judgment and motion for attorneys' fees and costs, filed December 22, 1992. The court has reviewed all written submissions and heard oral arguments. For the reasons stated on the record,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted. The award of arbitrator Michael P. Long, dated July 9, 1992, is hereby sustained.

IT IS FURTHER ORDERED that defendants' motion for attorneys' fees and costs is denied.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: Illegible 1993
Detroit, Michigan

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Arbitration Rules

In the Matter Between:

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 79

Union,

and

MERCY MEMORIAL HOSPITAL

Employer.

_____/

Case No.:
54 39 0746 90
Grievant:
Charlotte Baum
Arbirator:
Michael P. Long

An arbitration proceeding was held pursuant to a settlement agreement which ended a 1986 Federal lawsuit entitled *"Service Employees' International Union, AFL-CIO, Charlotte Baum, et al.* v. *Mercy-Memorial Hospital Corp., et al.*, Case No. 86-CV-75066-DT, the 1983-85 collective bargaining agreement between Mercy Memorial Hospital and the SEIU, and the Voluntary Labor Arbitration Rules of the American Arbitration Association.

The hearing was originally scheduled to commence on January 15, 1991 as set by to the official Notice of Hearing generated by the American Arbitration Association. It was scheduled to take place at Mercy Memorial Hospital located at 708 North Macomb Street, Monroe, Michigan (the premises of the Employer).

The Arbitrator appeared for hearing. The Employer was present but the Union appeared at the American Arbitration Association's offices in Southfield, Michigan. There was disagreement between the parties as to the appropriate location for the hearing. After consultation between the parties with the American Arbitration Association Tribunal Administrator and Arbitrator, the Arbitrator under Rules 10 and 19 of the Voluntary Labor Arbitration Rules of the American Arbitration Association determined that the hearing would be conducted at the Monroe Holiday Inn located at 1225 North Dixie Highway, Monroe, Michigan.

Testimony was taken on the following dates: 3/25/91, 3/26/91, 4/20/91, 5/20/91, 5/21/91, 5/28/91, 6/13/91, 7/29/91 7/31/91, 8/2/91 and 9/17/91. Twelve witnesses including the Grievant testified. Fifty-six exhibits were presented for admission, and fifty-four exhibits were admitted for consideration by the Arbitrator. Pursuant to Rule 21 of the Voluntary Labor Arbitration Rules of the American Arbitration Association, and at the expense of the Employer, an official transcript was taken by Classic Reporting Service, 705 First Federal Plaza, 701 Adams Street, Toledo, Ohio, 43624. Transcripts were appropriately provided to the Arbitrator for use in making the determination in this case.

Appearing on behalf of the Union was Christopher P. Legghio of the firm of Miller, Cohen, Martens and Ice, 17117 West Nine Mile Road, Suite 1400, Southfield, Michigan, 48075. Appearing on behalf of the Employer was John F. Brady of Brady and Hathaway, 1100 Penobscot Building, Detroit, Michigan 48226.

Briefs and reply briefs were submitted by both parties. Because of the voluminous nature of the evidence and arguments presented, time limits for completing the decision and award by the Arbitrator were extended by mutual agreement between the parties. The matter is now ready for decision.

BACKGROUND

This arbitration is between the Service Employees International Union, Local 79 AFL-CIO ("Union") and Mercy-Memorial Hospital ("Hospital", "Employer" or "Mercy-Memorial") and concerns the December 23, 1987 discharge of the Grievant, Charlotte Baum ("Baum" or "Grievant").

The 1983-1985 Collective Bargaining Agreement between Mercy Memorial and the Union expired on December 31, 1985. A new collective bargaining agreement was not reached between the parties until 1990.

In December 1986, approximately one year before Baum's discharge, the Union, Baum and other employees sued the Hospital for violations of the Labor/Management Relations Act and the Racketeer Influenced Corrupt Organizations Act ("RICO"). The lawsuit claimed that the Hospital helped finance a de certification petition filed by Nolan Smallwood, father-in-law of Florence Smallwood, a co-employee of Baum and witness who testified on behalf of the Hospital in this arbitration case.

On May 1, 1990, the Hospital and Union reached a settlement agreement on various issues, including outstanding litigation. Included in the settlement agreement was a

provision that the Baum grievance would be arbitrated pursuant to the provisions of the 1983-1985 collective bargaining agreement and the Voluntary Labor Arbitration Rules of the American Arbitration Association.

The grievance regarding Charlotte Baum's discharge had been filed on February 4, 1988. The grievance was denied at levels one and two. A demand for arbitration was filed pursuant to the law suit settlement on May 22, 1990.

On December 28, 1987, and January 19, 1988, shortly after her discharge, Grievant Baum filed a complaint and an amended complaint with the National Labor Relations Board (NLRB). The charge alleged that Baum had been discriminated against by the Hospital and discharged as a result of her Union activities and the exercise of her rights under Section 7 of the National Labor Relations Act.

On February 3, 1988, the Regional Director of the NLRB dismissed the Grievant's Unfair Labor Practice Charge, stating:

> . . .
>
> "However, the investigation failed to establish the required nexus between her activities and her discharge as well as any evidence that the Employer harbored any hostility toward Ms. Baum as a result of her activities. No evidence was discovered to indicate that the Employer's actions toward Ms. Baum were based on any prior cases filed with the Board by her or the Union, or any testimony she may have given in prior cases.
>
> The Employer contends that Ms. Baum's suspension or discharge were based primarily on

> evidence it discovered that she was involved in a scheme with at least one other employee that involved theft of time from the Employer by falsification of time cards. The investigation established that the Employer acted on its good faith belief that Ms. Baum did violate its rules. There was insufficient evidence that the Employer's actions were pretextual in nature.
>
> . . .
>
> Inasmuch as there is insufficient evidence to connect Ms. Baum's discharge to her activities for and on behalf of the Union, it is my decision that the charge herein with respect to the discharge of Charlotte Baum, and the Employer's refusal to provide the personnel record, as well as the eight (a) (5) allegation discussed above, be dismissed."

The Grievant appealed this dismissal to the NLRB General Council. This appeal was denied.

As mentioned previously, approximately one year before Baum's discharge, the Union representing Baum as well as Baum on behalf of herself, filed an action in the United States District Court against the Employer alleging violations of RICO. The Union and the Grievant alleged in this action a variety of unfair labor practices, refusals to bargain, unlawful interference and anti union animus on the part of the Employer. The lawsuit was settled on May 4, 1990. The terms of the settlement were reduced to a settlement agreement signed by the parties. According to the settlement agreement, the parties agreed to dismiss the RICO action based upon the following terms and conditions:

> "The Federal Court lawsuit, captioned *Hospital Employees' Division of Local 79, Service Employees' International Union, AFL-CIO; Charlotte Baum, Ninfa Beckner and Stephen McHenry,* Plaintiffs, v *Mercy-Memorial Hospital Corporation and Richard Hiltz,* Defendants, being Federal Court Case No. 86-CV-75066-DT shall be dismissed with prejudice, and without costs or attorneys fees being awarded to either party. The parties, through their respective attorneys, shall enter into a Stipulation dismissing the case with prejudice and without costs or attorneys fees, and releasing and discharging the Hospital, its individual employees and Mr. Richard Hiltz, its attorneys Keller, Thoma, Schwarze, Schwarze, DuBay and Katz, P.C. and its employees, shareholders and officers (individually and as corporate representatives) and the individual members of the Hospital Board (both past and present and in their individual and corporate capacities) from any claim, action, cause of action, unfair labor practice charge, grievance, administrative proceedings, etc., based upon, concerning, relating to or touching upon the allegations, matters or proceedings involved, in any matter whatsoever, in case No. n86-CV-75066-DT, including but not limited to any claim or cause of action that the released parties violated the Labor Management Relations Act, being 29 USC Section 141 et seq., and/or the Racketeer Influenced and Corrupt Organizations Act, being 18 USC 1961, et seq."

The "settlement agreement" in Paragraph 13 stated as follows:

> "All grievances filed prior to the date of Union ratification of the collective bargaining agreement shall be withdrawn with prejudice, except

> for the grievances of Charlotte Baum, Dora Morgan, Karen Sarnowski and Shelda Stroud. These grievances may be filed for final and binding arbitration under the provisions of the 1983-85 collective bargaining agreement as set forth below:
>
> . . .
>
> (b) The Charlotte Baum grievance shall be arbitrated under the Rules of the American Arbitration Association, provided the Union files a Demand for Arbitration, seeking reinstatement with seniority and make whole, with the American Arbitration Association within thirty (30) calendar days following the signing of this Settlement Agreement by the Union. . . . "

This arbitration involves the discharge of the Grievant, Charlotte Baum, on December 23, 1987. Mercy-Memorial Hospital contends that Baum was fired with just cause for several acts of misconduct including tampering with time cards, ringing the time card of another employee, misrepresentation of Hospital time records, leaving the Hospital premises during work hours without authorization, requesting other employees to break Hospital rules, and intentionally providing false and misleading information during the investigation of the foregoing incidents.

The Grievant, Charlotte Baum, has denied the allegations.

1983 – 1985 COLLECTIVE BARGAINING AGREEMENT LANGUAGE

Article III – Management Rights – Section 1

> "The Hospital retains and shall have the sole and exclusive right and shall have a free hand to

manage and operate the Hospital, including all of its operations and activities,

. . .

to establish Hospital policies and procedures,

. . .

all of such rights are vested exclusively in the Hospital and shall not be subject to the grievance procedure or any appeal from the exercise by the Hospital of such rights.

Section 2 – The Hospital, in addition to the rights set forth in Section 1 above, shall have the right to promote, assign, transfer, suspend, discipline, discharge, layoff, and recall to make and establish work rules of conduct and fix and determine penalties for violation of such rules, to discipline and efficiency among employees, and to establish and assign contingent and/or temporary personnel; provided that such rights shall not be exercised by the Hospital in contravention of any of the express provision of this Agreement.

Section 3 – The Hospital retains and shall have the sole and exclusive right to administer without limitation, implied or otherwise, all matters not specifically and expressly covered by the provision of Section 2 of this Article or excepted by the provisions of any other Article of this Agreement.

Article VI – Arbitration – Section 4 – Powers of the Arbitrator.

The Arbitrator shall have no power to add to, subtract from, alter or modify any of the terms of this Agreement or any of the functions or

responsibilities of the parties to this Agreement, or to substitute his judgment for that of either party, where said party has been given discretion by this Agreement. . . .

He shall have no power to change any practice, policy or rule of the Hospital not in conflict with the express provisions of this Agreement nor shall he substitute his judgment for that of the Hospital as to the reasonableness of any such practice, policy or rule. His power shall be limited to deciding whether the Hospital has violated a specific Article and Section of this Agreement. It being understood that in the case of disciplinary action, he shall have no power to substitute his judgment for that of the Hospital's as to the severity or degree of the penalty.

The Arbitrator shall not imply obligations or conditions binding upon the Hospital from this Agreement. It being understood that any matter not specifically set forth herein remains within the reserved right of the Hospital.

Section 6 – Each party shall pay its own costs of processing grievances through the Grievance Arbitration Procedures. The fee of the Arbitrator, his travel expenses, and the cost of any room or facilities, and the expenses of the Arbitration including the expense of a transcript, if any, shall be borne by the loosing [sic] party. The fees and wages of representatives, counsel, witnesses, or other persons attending the hearing on behalf of a party and all other expenses shall be borne by the party incurring the same. All filing fees of the American Arbitration Association shall be paid by the loosing [sic] party. The Arbitrator shall designate the losing party.

Article VIII – Dismissals – Section 1

After completion of the probationary period, no employee shall be discharged or suspended without just cause. Just cause for immediate discharge shall include such acts as: misappropriation of funds or theft; assault or attempted assault of a patient or personnel of the Hospital; being under the influence of alcohol or drinking alcohol on the Hospital premises; illegal use of drugs or narcotics; deliberate and material falsification of Hospital records; or gross personal misconduct detrimental to patients."

EMPLOYEE HANDBOOK

The Mercy Memorial Hospital Employee Handbook, which was in effect in December 1987 at the time of the Baum discharge contained 40 pages of text. Excerpts applicable to this case are as follows:

"Policies

The policies contained in this Handbook are for employees not covered by a collective bargaining agreement." *(It is noted that while the settlement agreement moving the Baum case to arbitration indicates that the parties are to proceed under the standards set forth in the 1983-85 collective bargaining agreement, there was a dispute as to the status of that agreement in December of 1987. It is the Hospital's contention that the provisions of this Handbook applied to the Grievant because at the time there was no successor agreement to the one which expired in 1985.)*

. . .

"Absence

Everyone is important in the functioning of the Hospital. If you are absent, someone else must perform your duties and responsibilities. You must notify your supervisor at least one hour in advance to the starting time of your shift if you are going to be absent. Failure to notify your supervisor as stated above will result in the forfeiture of any pay for that day that may be due such as sick pay.

. . .

Rules of Conduct

Although the majority of our employees choose to abide by proper behavior patterns making this set of rules hardly necessary, there are those few who will not follow directions unless forewarned of specific penalties.

Any employee whose action is contrary to the best interest of Mercy-Memorial Hospital and it's patients and employees is subject to disciplinary action. Anytime that disciplinary action is taken by your supervisor or department head, the specific infraction that has occurred, the date of the incident and the action to be taken shall be discussed with you, reduced to writing, signed by the employee and placed in your personnel file and a copy given to you.

Depending upon the severity of the violation, the following steps are usually taken:

First: A verbal warning (documented in writing) from your supervisor or department head.

Second: A written warning from your supervisor or department head.

Third: Suspension without pay ranging from one to seven days.

Fourth: Dismissal.

However, based on the seriousness and nature of the offense, disciplinary action may be initiated at any step.

The following represents acts of misconduct which are subject to disciplinary action. This is not intended to be an all-inclusive list, but rather are examples of misconduct that will be considered reason for disciplinary action.

. . .

8. Repeated failure to ring own time card.

9. Failure to call in your absence to your supervisor within one hour of the start of your shift.

The following acts are representative of misconduct which would be reason for immediate dismissal. Again, this is not intended to be an all-inclusive, but rather are examples of misconduct that will result in immediate dismissal.

. . .

3. Tampering with time cards or ringing the time card of another employee.

. . .

10. Misrepresentation of Hospital records (falsifying information regarding the application blank, leave of absence, time records, sick leave and benefits or any other record of the Mercy-Memorial Hospital).

. . .

13. Leaving the Hospital premises during working hours without authorization.

. . .

15. Repeated violation of rules."

REASONS FOR DISCHARGE

The original discharge letter to the Grievant dated December 23, 1987 from Dennis Pogarch, Human Resources Director, alleged six infractions.

On February 24, 1988, in a subsequent letter to Ms. Baum, Mr. Pogarch reiterated the six infractions and indicated in more specific terms what acts or omissions of the Grievant constituted each offense. They are as follows:

"1. Tampering with time cards and ringing the time card of another employee.

– An analysis of time cards over the past year has revealed that you were punching in or out at the same time as Melody Ferris and other employees even though these employees were not working in the facility at the time.

– You made a statement to an employee that you have punched the time card of another employee in the past.

– An employee has stated that you have punched her (the other employee's) time card.

– You punched another employee's time card when the employee called in sick. You then defaced a time entry by using "white out" on the employee's time card. Example: July 30, 1987.

– An employee has observed you punching the time card of another employee.

2. Misrepresentation of hospital time records.

– Leaving work early and not punching out, then writing in your normal quitting time on your time card. Example: November 2, 1987.

– Clocking another employee in or out at times when the employee was not on hospital premises. Example: September 22, 1987 and September 26, 1987.

– Defacing time entries as indicated in #1 above.

3. Leaving the hospital premises during working hours without authorization.

– As indicated above, you left work early on November 2nd without authorization.

– Subsequently, you attempted to get paid for the time, by writing in 1:00 p.m. on your time card. Mr. Hind withheld 15 minutes of pay from your pay check and you chose not to confront Mr. Hind regarding that incident.

4. Asking and encouraging other employees to break hospital rules.

– On November 2nd, you encouraged another employee to leave work early without, and stated that you would get a third employee to clock both of you out at the normal quitting time.

– Later that day you asked another employee to clock you out at your normal quitting time even though you still planned to leave work early.

5. Intentionally providing false and misleading information to hospital personnel during disciplinary investigations and otherwise attempting to interfere with the investigation.

– You concocted an untrue alibi in an effort to erroneously prove that you didn't leave work early on November 2nd. Subsequent discussions with Chris Vandercook and other witnesses established that the account given by you was intentionally false and misleading.

– You provided false information about an incident involving Melody Ferris on September 26th. You said you saw her in the locker room at 12:45 p.m. However, several witnesses have stated that Melody Ferris was not in the hospital building after 10:30 a.m. and that you told them that she had gone home.

– On October 22, 1987 you stated that you left the hospital with Melody Ferris shortly after 1:00 p.m. Several witnesses have stated that Melody Ferris had not been in the building for several hours. In fact she was seen leaving the building at approximately 10:30 a.m.

– Additional statements given by you regarding the incidents referred to above and subsequent related events have been proven by witnesses not to be true.

6. Repeated violation of the rules.

Your disciplinary record reflects a pattern of continual disregard of hospital rules.

9/09/80 Verbal warning – excessive tardiness

4/27/81 Verbal warning – leaving work area

5/01/81 Written warning – leaving work area

9/17/81	Verbal warning – failure to empty trash
7/26/82	Written warning – misrepresentation of working hours
8/31/84	Warning – use of foul and abusive language to a supervisor
2/21/85	Verbal warning – leaving work station to conduct union business
2/21/85	Verbal warning – creating a disturbance
6/27/85	Written warning – did not comply with work assignment
8/05/86	Conference regarding inappropriate statement to co-workers (not part of personnel file)
9/03/87	Written warning – abusive language

DISCUSSION

Mercy-Memorial's Dietary Department is responsible for the cooking for all patients and the Hospital cafeteria. In 1987 at the time of the discharge of the Grievant, there were three shifts in the Dietary Department. Each shift required at least two cooks. At the time of the discharge, Eva Moore was the Dietary Department Supervisor, Pete Hind was the Department Head and Dennis Pogarch was the Human Resources Director.

In 1987, the morning shift (4:30 a.m. until 1:00 p.m.) cooks were Effie Miracle and Charlotte Baum. Melody Ferris was the relief cook for this shift. The next shift ran from 9:30 a.m. until 6:00 p.m. Stella Richter served as cook on

that shift. Florence Smallwood served as cook on the 11:00 a.m. until 7:30 p.m. shift. Pat Jacobs worked as relief cook on the later shift. Sharon May was also employed as a cook during 1987. She normally worked the 9:30 a.m. to 6:00 p.m. or 11:00 a.m. until 7:30 p.m. shift. Other Dietary Department employees were Kathy Respondeck, Rose Nocella, Edna Lambert and Joyce Messer.

In addition to two cooks per shift, the Dietary Department scheduled a baker on a part time basis. Baking days were usually every Tuesday, or every other Tuesday, depending upon the patient population. This schedule was flexible, however, as baking was sometimes done in advance, or at different times at the discretion of the baker and supervision or when there were scheduling problems. Duties could last different times from under five hours to seven or more hours on any given day. Theoretically, if baking lasted beyond five hours, it had to be approved by Supervisor Moore, Department Head Hind or the Diet Clerk. Melody Ferris, Diane Boik and Pat Jacobs all worked as bakers at one time or another.

Although the Diet Department master schedule, which set forth the schedule of all Department employees established the starting and stopping time for bakers, there is no record that a baker had ever been disciplined for not starting or stopping at a specific designated time.

Department Head Hind and Supervisor Moore prepared and posted a master work schedule for the Dietary Department. This master schedule established the hours of work for a six week period. To accommodate frequent schedule changes, the Department utilized a supplemental schedule, which sometimes changed as many as two

or three times per day. According to Supervisor Moore, the supplemental schedule was posted each week, and it established the work schedule for the following two weeks. She testified that it was "a living, breathing schedule", and changed depending on "what was happening in peoples lives".

Even the supplemental schedule was changed. This was commonly accomplished by writing the changes in longhand on the supplemental schedule.

The official procedure for obtaining replacements in the Dietary Department involved the ill employee calling either the Diet Clerk or Supervisor Moore, with Moore or the Diet Clerk responsible for finding a replacement.

The procedure, however, for the cooks who worked the 4:30 a.m. shift was different. They could, if they were ill, call the Hospital switch board. The switch board would then notify the cook who had appeared for work that day that her co-worker would not be in. Testimony indicated that while Supervisor Moore was sometimes called to find a replacement, it was really incumbent on the cook who appeared for work at 4:30 a.m. to find a replacement cook. In those cases, the early scheduled cook would usually call the cook scheduled to begin work at 11:00 o'clock and ask her to come in early.

It was then the practice for Ms. Moore, who would appear for work later, to replace the cook on the 11:00 o'clock shift. It is noted that this was the acceptable, established practice even though it was different from the Absence Policy as stated in the Employee Handbook.

Each employee in the Dietary Department was required to punch in or out on a time card when reporting to or leaving work. The time clock for the Dietary Department was located in the basement of the facility directly across from the elevator.

Each employee's time card contained space for the supervisor to initial or sign indicating their approval at the end of the two week pay period. The supervisors could also initial a space which directly corresponded to a specific day.

Hospital work rules stated that changes or alterations in the time card must be initialed by a supervisor. It was the testimony of witnesses which was corroborated by the entry and examination of almost 300 time cards that the accepted practice was that this requirement was not routinely enforced. A significant number of time cards that were signed on the bottom indicating approval of the two week time period had been whited out or contained erasures, cross-outs, or marked or written in entries by employees other than the supervisor and without the supervisor's explicit daily approval being indicated. Employees had been paid for the hours and none had been disciplined.

The time clock recorded time on a 24 hours basis that divided up hours into hundredths of an hour as opposed to minutes. Each one hundredth of an hour as indicated by the time card would be the equivalent of 36 seconds. Additionally, the time clock would only stamp times in increments of even numbered hundredths and every fifth one-hundredth. Thus, in reality, the time clock would

change its stamp every 72 seconds or 36 seconds, depending on whether the clock was stamping and even hundredth or the fifth one-hundredth of an hour time period.

The Grievant, Charlotte Baum, began working at Mercy-Memorial Hospital on May 21, 1977. At the time of her discharge on December 23, 1987, she was classified as a cook. In 1979, Baum had become the Union Steward for the Dietary, Housekeeping and Maintenance Units of the Hospital. She retained this position until the time of her discharge.

According to the testimony, the Grievant had worked in the position of morning cook at the Hospital for approximately one and one-half years. Her shift started at 4:30 a.m. and ended at 1:00 p.m. Her usual breaks were from 8:45 to 9:00 a.m. and 12:45 to 1:00 p.m. with lunch from 11:00 to 11:30 a.m.

DISCUSSION OF REASONS FOR DISCHARGE

1. *Tampering with time cards and ringing the time card of another employee.*

1. (a.) An analysis of time cards over the past year has revealed that you were punching in or out at the same time as Melody Ferris and other employees even though these employees were not working in the facility at the time.

Lengthy testimony as well as examination of exhibits reveal that it was very common for employees at Mercy-Memorial to punch in or out at the same time. It was especially common for employees to punch out at the same time as their shift ended. In addition, it was the testimony of the Grievant, Charlotte Baum, that it was

customary for Dietary Department employees on the morning shift to wait for each other in the Parking lot in their automobiles and then walk into the Hospital together. This does not seem unreasonable given the 4:30 a.m. starting time, lack of activity and pre-dawn darkness.

The allegation that other employees who punched in or out at the same time as Ms. Baum were not working is dependent upon proofs as to July 30, September 22, September 26, October 22 and November 2, 1987, which will be discussed later in this decision.

The fact that Ms. Baum punched in or out at the same time as others does not sufficiently demonstrate any wrongdoing to constitute grounds for disciplinary action.

1. (b.) You made a statement to an employee that you have punched the time card of another employee in the past.

1. (c.) An employee has stated that you have punched her (the other employee's) time card.

In early December of 1987, employee Diane Boik, who was on medical leave at the time, was called into the Hospital offices for a meeting with Department Head Hind and Human Resources Director Pogarch. At the meeting, Boik was questioned about having her time cards punched by Baum and Melody Ferris. Boik was warned that if she did not admit this violation, she would be "dragged down with them". Boik indicated that no one had punched her time card except her.

On December 21, 1987, Hind again called Boik back into his office where just the two of them met in private. Hind

wrote out a statement and indicated to Boik that she would be terminated immediately if she did not immediately sign it.

The statement read as follows:

> *"To: Mercy Mem. Hosp., Personnel Dept.*
>
> *Re: Cook time in punches*
>
> *I was punched in by Charlotte Baum and Melody Ferris on those days I was assigned to Cook with them. I did not request them to punch me in, and I did work those days.*
>
> *I tell you this because I want to Cooperate and do not want my job placed in Jeopardy.*
>
> *Signed*
>
> *Date:*
>
> *Ammunity (sic) from any prosecution granted 12/21/87 on above matter."*

Boik signed the statement and dated it 12/21/87. The bottom section granting immunity was then signed by Mr. Hind.

The following day, December 22, 1987, in a telephone call with Mr. Pogarch, Ms. Boik indicated that she had only signed the statement after being threatened by Hind that she would be fired if she failed to sign it. She recanted the statement denying that it was true.

Boik was called into Pogarch's office. Pogarch then telephoned the Hospital's attorney, Dave Kempner. During a telephone conference call, Kempner repeatedly apologized to Ms. Boik for Hind's conduct. A meeting was set up for Boik to meet with Kempner.

The following day, December 23, 1987, Ms. Boik, accompanied by her father, met with Kempner. Ms. Boik at that time told Kempner that she would not accept his apology for Hind's conduct. Boik again recanted the statement she had given to Hind and told the Hospital that she had punched her own time cards and that she was pressured into signing the statement with fear of loosing [sic] her job.

In an official sworn affidavit to the National Labor Relations Board, signed January 14, 1988, Diane Boik again reiterated her recantation of the statement signed in Hind's office on December 21, 1987.

It was the testimony of Mr. Pogarch that even though Boik had recanted her statement, he relied upon it as being true and disregarded the recantations in making his determination regarding the discharge of Charlotte Baum.

It is found that Diane Boik's statement of December 21, 1987, which was signed under duress and has been recanted by her several times in meetings with the Employer, the employer's attorney, in a sworn affidavit to the National Labor Relations Board, and during her sworn testimony at the arbitration hearing cannot be relied upon as factual in justifying any disciplinary action toward Grievant Baum.

The allegation is, therefore, unsubstantiated and fails to justify disciplinary action.

1. (d.) You punched another employee's time card when the employee called in sick. You then defaced a time entry by using "white out" on the employee's time card. Example: July 30, 1987.

The July 30, 1987 entry on the time card of Melody Ferris has been whited out. Under the white-out, as determined by the Hospital through the services of a special photographic investigation, is the time, 4.20 and date, Jul [sic] 30.

Ms. Ferris was scheduled to work the morning shift on July 30 with Charlotte Baum. Charlotte Baum's time card entry for July 30 shows that she also punched in at 4.20. This means that the time cards of Ferris and Baum were punched within 72 seconds of one another.

Ms. Ferris, however, was ill and did not work her shift on July 30, 1987. Ms. Ferris and Ms. Baum were the only two dietary employees scheduled to work beginning at 4:30 a.m. on July 30, 1987.

Ms. Ferris told three different stories concerning what happened on that date.

The first story, told during the course of Mr. Pogarch's investigation by Ferris in November, 1987, was that she was ill on July 30 and did not report for work, but had mistakenly punched in on the July 30 time slot on July 31. She stated that when she realized the mistake on July 31, she whited out the July 31 time stamp entry which was in the July 30 slot on the card, and punched in the correct date of July 31 in the July 31 time card space.

This story was demonstrated to be untrue when the photographic investigation revealed that the clock had punched July 30 and not July 31 in the July 30 slot.

The Union contends that because Ms. Ferris wasn't questioned about this until December 17, almost five months after the incident, she mixed up the July 30 date with a

September 6 date when she did punch in in the wrong slot after she returned from a holiday.

Mr. Pogarch, weighing Ms. Ferris' story in light of the results of the photographic investigation, terminated the employment of Ms. Ferris. A few days later, Mr. Pogarch telephoned Ms. Ferris and offered her a resignation in lieu of discharge. He stated that he did this because of her good work record in the past. Ms. Ferris initially declined the offer. She later changed her mind when she increased her hours at her other employment and submitted her written resignation on December 28, 1987 with the understanding that the Hospital would not reveal the circumstances of Ms. Ferris' separation from employment at the Hospital as any other reason than "Melody Ferris resigned for personal reasons".

On January 14, 1988, Ms. Ferris signed a sworn affidavit as part of an investigation conducted by the NLRB concerning the unfair labor practice charge filed by Ms. Baum and the Union.

In that sworn NLRB affidavit, Ms. Ferris stated:

> "I told them that I had punched in the wrong day and later put white out on it and punched in the right day. In reality, I had called in sick on those days and someone, I don't know who, punched me in so I did white them out.
>
> They said my friend was not backing me up. Then they said the person who was suspended with me was going to be discharged. Mr. Hind got real mad at me and was yelling at me. They again questioned me about my relationship with Charlotte Baum.

> On the afternoon Baum was discharged, Mr. Pogarch called me and gave me the option of resigning instead of being terminated. The next day I informed Mr. Pogarch that I would accept his offer and resign.
>
> Mr. Pogarch asked me if I knew anyone else had been doing this, if I had seen anyone else punch anyone else's card.
>
> I told him I wasn't aware of it.
>
> I have never asked Baum to punch any time card, nor do I know if she ever did. I have never punched anyone's card."

At the arbitration hearing, in testimony given on May 28 and June 13, 1991, Ms. Ferris indicated that she appeared for work on July 30, 1987 and punched her own card. She testified that she woke up sick to her stomach but drove to work arriving about 18 minutes earlier than her scheduled starting time. She further indicated that she met Ms. Baum at the time clock and they both punched in together at approximately 4:12 a.m. Ms. Ferris stated that she went directly to the locker room where she stayed for a few minutes. She then went home without punching out.

She further stated that the next day, on July 31, after arriving at work, she went to the Diet Clerk's office where she obtained white out and corrected the July 30 entry by whiting it out completely.

This third story is refuted by witness Florence Smallwood who stated that on July 30 she heard a rumor that Ferris' time card had been punched in even though she had called in sick. She indicated that the evening of July 30, she pulled Ferris' time card and noticed that the clock in

for that day had been whited out. Smallwood deduced that it was "most likely Baum" who had punched Ferris in and then later whited out the entry on the time card.

Smallwood indicated that she heard the rumor that Baum had punched Ferris' time card and Ferris wasn't at work from Pat Jacobs. Pat Jacobs, in her testimony, indicated that she did not recall having any conversation with Baum in which Baum told her that Baum had punched the time clock for Ferris. Jacobs further testified that she never had a discussion with Baum in which Baum indicated that Baum had tampered or punched in the time card of any other employee in the Hospital. Jacobs stated that she did not tell Smallwood that Ferris' card was punched-in or that Baum had punched anyone's card.

Ms. Smallwood originally testified that she began checking time cards out of "curiosity". Upon further questioning and cross examination, she stated that Department Head Hind had indicated to her in a private meeting with him in his office that he felt something was going on with the time cards. Hind asked Smallwood that if she saw or heard anything about time cards, she should inform him. This meeting took place some time between July 30 and September 26, 1987. The Union contends that Smallwood acted as the Hospital's agent during a surreptitious but targeted investigation of Baum and Ferris. The Union further contends that as the "secret agent" of Hind, Smallwood had an incentive to give biased testimony in favor of the Hospital.

Indeed, Ms. Smallwood's testimony that she heard the rumor about the wrongfully punched-in time card from Ms. Jacobs was refuted by Ms. Jacob's testimony.

The Employer indicates that the story of Ferris is suspect because the work "sick" is written next to the white out when on other occasions when Ferris reported to work and then went home, she wrote, "went home sick" on the card as opposed to those occasions when she did not appear at all where she wrote only "sick" on the card such as she did on July 30.

Grievant Baum's testimony at the arbitration hearing agrees with the testimony of Ferris as given at the arbitration hearing. Baum indicated that she and Ferris clocked in together and that Ferris got sick and left.

While this arbitrator doesn't place much veracity in any of Ferris' stories, it is noted that there is no implication of wrongdoing by Baum in any of Ferris' stories. The fact that Ferris told three different stories does not in and of itself implicate Baum in any wrongdoing. Smallwood's testimony, which indicated she was told information by Pat Jacobs was refuted by Ms. Jacobs. The direct facts that implicate Ms. Baum with the situation are that Ms. Baum and Ms. Ferris were scheduled to come in to work at the same time. It is possible that they did meet and punch in at the same time and that the time card entry was whited out some time before the evening of July 30 rather than on July 31, 1987. There were a number of employees who had access to Ferris' time card between 4:30 a.m. and the evening of July 30 when Ms. Smallwood noticed that it was whited out.

The Employer argues persuasively that because Ferris told three different stories, she must have been lying regarding two of them. The Employer chose to believe the second story (that was given to the NLRB). The Employer

then argues that because Baum's testimony at the arbitration agreed with that of Ferris' testimony at the arbitration, Baum must also by lying.

It can only be speculated as to which of Ms. Ferris' stories are correct, if any. However, there is no direct evidence that her testimony that agrees with that of the grievant is false. The grievant's testimony is not proven false just because it synchronizes with testimony given by one who has given conflicting testimony in the past.

There is not sufficient reliable evidence to substantiate the charge that it was Baum punched-in and/or or defaced Ferris' time card on July 30. 1987.

1. (e.) An employee has observed you punching the time card of another employee.

Sharon May, a cook at Mercy Memorial was called by the Hospital to a conference on January 27, 1988 in Mr. Pogarch's office with an NLRB investigator present as part of the NLRB investigation. This was approximately one month after the discharge of Charlotte Baum.

May indicated during this investigatory interview that at some time between May and November of 1987 she saw Charlotte Baum punch two time cards. She signed a sworn affidavit to the NLRB to this effect.

Her statement, in pertinent part, was:

> "I was going down to the dish room at 1:00. As the elevator doors opened, Charlotte, she was standing in front of the time clock. There was a time card in the machine. She clocked that time card, took another time card out, clocked that. I continued on my way to the dish room. When I

> got to the dish room door, I turned around and Charlotte was standing at the elevator. She said, 'Bye', and I said 'Bye' ".

At 1:00, the time this took place, Ms. May would have been in the middle of her work day while Ms. Baum would have been punching out at the end of hers. Ms. May indicated that she not see nor investigate who the time cards belonged to. She and Ms. Baum exchanged congenial good-bys. May indicated that Baum did not seem nervous when she saw May, and Baum did not act as if she were trying to hide anything from May.

Ms. May also testified that she had heard rumors that people were punching other people's time cards. Someone had said that Baum and Ferris were doing this, but May could not remember who made this accusation nor when it was made.

It is noted that Ms. May strongly denied ever having spoken to anyone from management about this incident prior to the NLRB interview with Mr. Pogarch and the NLRB agent in Mr. Pogarch's office on January 27, 1988.

Mr. Pogarch, in his sworn affidavit to the NLRB given the day after he and the NLRB agent had heard May's statement, said:

> "prior to my notifying of her (Baum's) discharge, Kempner and Myleft met with another dietary employees who told us that one day during the summer she was downstairs near the time clock when she saw Baum punch herself out then reach for a second time card and punch that one also."

(Sic)

In his arbitration testimony, Mr. Pogarch indicated that he did have someone who told him prior to the time of Baum's discharge (12/23/87) that she saw Baum tampering with time cards. Pogarch indicated that that person was Sharon May.

Pogarch was questioned on cross examination specifically as to whether he had the information prior to or after the discharge of Baum. Mr. Pogarch was very specific that May told him of this before the discharge of Baum.

Regardless of when Mr. Pogarch was advised of the information, the proofs at best demonstrate only that Baum punched a card, removed it from the time clock and punched another. From the evidence presented, we do not know whose card was punched, whether there was a mistake that was officially corrected by supervision, whether the card or cards were blank or any other pertinent information upon which to justify disciplinary action.

In the face of unanswered questions about exactly what happened, the exchange of congenial conversation with the witness, and Baum's normal behavior demonstrating no fear of being discovered doing something wrong, it is not evident that Baum's actions constituted the punching of another employee's time card. The allegation is unsubstantiated and there is insufficient evidence upon which to justify disciplinary action.

2. Misrepresentation of hospital time records.

2. (a.) Leaving work early and not punching out, then writing in your normal quitting time on your time card. Example: November 2, 1987.

On November 2, 1987, Charlotte Baum and Stella Richter were scheduled to and did work the morning shift beginning at 4:30 a.m. as cooks.

At about 8:30 that morning, Ms. Richter asked Ms. Baum for a ride home. Baum told Richter that Baum had to leave early because she had something to do. Baum indicated that she would have Kathy Respondeck, the salad maker who came in later, punch them out. Richter agreed, but really didn't want to leave early.

When Sharon May, the afternoon cook, came in to work, Richter discussed her earlier conversation with Baum with May and made arrangements for she (Richter) and May to pretend to have May's husband take her home. This was to be revealed to Baum by Richter and May having a conversation in front of Baum that would indicate that in return for a ride home by May's husband, Richter would do May's banking for her.

Richter and May held this conversation in front of Baum, and Richter told Baum that May's husband would drive her home. At this Point Baum asked Richter to clock her (Baum) out since Richter would be there until 1:00 p.m. Richter agreed to do so.

Richter testified that at about 11:40 a.m. she saw Baum leave the kitchen by the elevator.

Richter did not see Baum return to the kitchen that day, nor did Richter punch Baum out at 1:00 o'clock as had

been agreed. Richter did not actually get a ride home from May's husband. She stated that she got one from another employee whose name she couldn't remember during her testimony at the arbitration proceeding.

The next work day for Richter and Baum to work together was November 5, 1987. At that time, Richter told Baum that Richter hadn't punched her out. Baum then asked Richter if supervisor Moore or Department Head Hind had said anything about it. Richter's answer to Baum was that they had not. Baum said she would just write in the time since they've done that before.

Richter testified that it was a common, well accepted practice for employees to write in times on their time cards both with or without initialing by supervisor Moore or Department Head Hind.

Richter stated that she did not report this incident to management until she was called into Mr. Pogarch's office on November 10, 1987, for a meeting with Mr. Pogarch and Mr. Hind. Apparently Sharon May had already informed management of the November 2nd incident.

Richter testified at the arbitration that she drove to and from work on a number of occasions with Baum and that at no time during her employment with Baum did Baum ever say that she had someone punch her in or out if she were to arrive late or leave early.

On November 13, 1987, Mr. Pogarch held two meetings, the result of which was the suspension of Charlotte Baum and the discharge of Melody Ferris. In the first meeting he met with Melody Ferris and confronted her about a

number of incidents regarding her clocking in and out (including the July 30 incident). As a result of her non convincing explanations, at the conclusion of the meeting Pogarch fired Ferris.

Pogarch then called Charlotte Baum in for the second meeting. Pogarch confronted Baum with the incidents reported to have occurred on November 2. Baum stated that from approximately 12:45 to approximately 1:00 p.m., during her normal break period, she was meeting with another employee of the Hospital regarding union business. Pogarch demanded to know who that employee was. Baum refused to identify the employee to Pogarch without the employee's permission. She attempted to call the employee on Pogarch's phone during the meeting, but there was no answer.

At the conclusion of the meeting, Baum had promised to seek permission from the employee with whom she met on November 2 to disclose his name to Pogarch as soon as possible. Baum was suspended from employment at the end of the meeting.

On that same evening (November 13), Baum visited with Sharon May and Stella Richter, who was at Sharon May's house. Richter stated that Baum asked her to indicate to management that she (Baum) had a meeting regarding union business with Chris Vandercook. Richter testified that she did not make that representation to management because Baum had not told her of any such meeting on November 2, before Baum left.

Baum secured permission from the employee she met with on November 2 to divulge his name and telephoned Pogarch the next day. Pogarch was not in. On November

17, the following work day for Pogarch, Baum spoke to Pogarch and told him the name of the person that she had been speaking to on November 2 was Chris Vandercook. Vandercook had been fired by the Hospital after November 2nd, but prior to November 17th.

Baum told Pogarch that she had the meeting with Chris Vandercook on the loading dock area of the Hospital. After receiving this information, Mr. Pogarch talked to several employees including Mr. Vandercook, Ms. Richter and Gary Draves and Eddie Bezeau (both co-employees of Vandercook from the maintenance department).

Draves, on direct examination, indicated that at all times from 11:30 a.m. until 1:15 p.m., Chris Vandercook was inside the Hospital Powerhouse working, and that he (Draves) did not see Baum anywhere near the powerhouse on that date.

Mr. Pogarch relied on Gray Draves' statement that Vandercook was with him all day. Pogarch deduced that, therefore, Vandercook could not have met with Baum.

On cross examination, however, Draves admitted that while he worked with Vandercook all day, he was not sure whether Vandercook had left the immediate work area between the time from approximately 11:30 until 1:00 o'clock to go to the restroom or to get tools or for any other reason.

As far as Pogarch was concerned, inconsistencies in the stories of Baum, Vandercook, Draves and Eddie Bezeau, a co-worker with Vandercook and Draves, constituted an unacceptable explanation as to where Baum was between

12:45 and 1:00 p.m. on November 2. Pogarch deduced that Baum had left the hospital premises.

Baum had told Pogarch that the meeting between she and Vandercook was prearranged prior to November 2. Eddie Bezeau said he had made arrangements for a meeting between Vandercook and Baum that day. He also said that he saw Baum in the kitchen area between 1:00 and 1:30 p.m. [after her normal quitting time]. According to Pogarch, Vandercook said that he had been working outside pulling weeds and just walking by when he met Baum and discussed his problem with her. Draves said that he was with Vandercook all day working inside the powerhouse and never saw Baum.

It is clear that Draves' observations are inconclusive as to whether there was or was not a meeting between Baum and Vandercook at approximately 12:45 on 11/2/87 as he admits that Vandercook could have left the powerhouse without his noticing.

Vandercook's and Bezeau's statements also present questions. Vandercook's statements would have corroborated a meeting with Baum that was not prearranged prior to November 2 different from what she had indicated. Bezeau's statement indicated a pre-arranged meeting (arrangements made that day) as well as the presence of Baum on the premises until after 1:00 p.m. Neither Vandercook nor Bezeau appeared for testimony.

No one stated that they saw Baum leave the Hospital premises before 1:00 p.m. on 11/2/87. Baum was, however, docked 15 minutes pay for that date by Department Head Hind.

The facts are confusing and in dispute. One assumption is as good as another as to what really happened. While Baum may have planned to leave early, she may have changed her plans to help Vandercook with his problem.

There is insufficient evidence to prove the allegation or justify disciplinary action for leaving work early, and, therefore, for misrepresentation of Hospital time records.

However, while there is insufficient evidence to justify discharge for misrepresentation of Hospital time records, there is sufficient evidence to adequately show that Charlotte Baum asked or encouraged another Hospital employee to break Hospital rules. That will be discussed later in response to infraction number 4.

2. (b.) Clocking another employee in or out at times when the employee was not on hospital premises. Example: September 22, 1987 and September 26, 1987.

Dennis Pogarch testified that based on statements of other dietary department employees, he concluded that Ms. Baum punched Ms. Ferris' time card on September 22, 1987, after Ms. Ferris had left early to go home.

On September 22, 1987, Baum clocked in at 4.20 and Melody Ferris clocked in at 4.50. Thereafter, Baum punched out at 13.02, the same time that Effie Miracle punched out. Melody Ferris' card was punched-out at 13.04.

In her testimony at the arbitration hearing, Florence Smallwood, a cook on the 10:45 a.m. to 7:15 p.m. shift testified that when she arrived at the Hospital at about 10:30 a.m., she saw Ferris leaving the Hospital through the back door as she, Smallwood, came in. Thereafter,

Smallwood did not see Ferris anywhere in the Hospital for the balance of the day.

Smallwood also testified that at approximately 11:30 a.m. she checked Ferris' time card and that it was not punched out.

Smallwood again checked Ferris' time card at 1:30 p.m. and saw that it had been punched out at approximately 1:00 p.m.

Effie Miracle, whose punch out time was exactly the same as that of Balm's stated that she did not see Baum clock Ferris out. There was no testimony from anyone indicating that they saw Baum clock Ferris out. Baum denied that she clocked Ferris out.

This evidence does not substantiate the finding that Charlotte Baum misrepresented Hospital time records concerning the events of September 22, 1987.

September 26, 1987 was the date of the Mercy Memorial Hospital annual picnic for employees. On that date, food was not only prepared for patients and those in the cafeteria, but also for the employees who were going to attend the picnic. Both Melody Ferris and Charlotte Baum were scheduled to work as cooks on the 4:30 to 1:00 p.m. shift.

Stella Richter testified that she became aware that Ms. Ferris was absent from work when she heard Ms. Baum tell another kitchen employee to "serve lighter on the potatoes . . . because Melody went home."

Mr. Pogarch testified that in the course of his investigation regarding Baum, Florence Smallwood, Rose Nosella, and Stella Richter each had told him that Ms. Baum had

indicated by the above cited quote that Ferris had gone home sick on September 26, 1987.

Melody Ferris testified at the arbitration hearing that she was at the Hospital for her entire shift on September 26, 1987, and did not go home before 1:00 p.m. Both Baum's and Ferris' time cards bear the same time "out" entries on September 26, 1987 "13.00".

Ms. Ferris testified that she became sick in the mid-morning of September 26th. She testified that she went to the locker room for a while, and then went to the emergency room of the Hospital. After what she described as a fruitless attempt to get a tagamet pill from the emergency room, Ferris testified that she went to the gift shop and bought Rolaids. From there, Ferris went back to the locker room where she ran into Baum shortly before 1:00 p.m. Ferris stated that she punched her card out and went home at 1:00 p.m.

Florence Smallwood testified that she went into the basement to the time card rack and looked at Ferris' time card and there was no punch on it at approximately 12:00 o'clock. From there Smallwood went to the locker room looking for Ferris. She did not find Ferris nor her coat or a purse or anything of that nature. After 1:30 p.m., Smallwood again checked Ferris' time card and found that it was punched out at 1:00 p.m.

Ms. Baum has denied punching out Melody Ferris. The Employer relied on Baum's casual statement that Ferris had gone home sick as an indication that Ferris really did go home sick and did not punch out. From that information the Employer concluded that Baum must have punched Ferris out at 1:00 p.m.

There are no witnesses that saw Baum punch Ferris' card. There is nothing to show that Baum didn't actually think that Ferris had gone home until Baum ran into her in the locker room at approximately 12:45 p.m. Baum was not the only employee who had access to the time cards.

Disciplinary action is not justified as the allegation that Baum punched Ferris' card is not adequately substantiated.

2. *(c.) Defacing time entries as indicated in #1 above.*

This charge was dealt with under Infraction number one above. It is found that there is insufficient evidence to justify disciplinary action against the Grievant.

3. *Leaving the hospital premises during working hours without authorization.*

3. *(a.) As indicated above, you left work early on November 2nd without authorization.*

This matter was dealt with under infraction number two above. There is not adequate proof to justify discipline.

3. *(b.) Subsequently, you attempted to get paid for the time, by writing in 1:00 p.m. on your time card. Mr. Hind withheld 15 minutes of pay from your pay check and you chose not to confront Mr. Hind regarding that incident.*

This matter was dealt with under infraction number two above and indicates that action (docking of pay) was taken at the time that this occurred. There was a dispute at the arbitration hearing regarding the matter of whether the instant grievance covered the docking. The Union's Position was that the docking happened so close to the suspension and discharge that the discharge grievance

was meant to cover all the actions taken by the employer as a result of the alleged offenses leading to discharge.

In light of the suspension on November 13 and subsequent discharge, with all the complicated litigation, the failure of the grievant to separately file a grievance over a pay docking of 15 minutes will not be held to be an indication that the Grievant by not filing the grievance has made an admission that she left the Hospital premises during working hours without authorization as in infraction number three alleges.

4. Asking and encouraging other employees to break hospital rules.

4. (a.) On November 2nd, you encouraged another employee to leave work early without, and stated that you would get a third employee to clock both of you out at the normal quitting time.

4. (b.) Later that day you asked another employee to clock you out at your normal quitting time even though you still planned to leave work early.

Pursuant to the discussion under infraction number two above, it is found that the Grievant is guilty of asking and encouraging other employees to break Hospital rules by suggesting to Stella Richter that she leave early and have another employee punch Grievant and her out. Grievant further encouraged her to break Hospital rules by requesting that she punch out Grievant's time card. Grievant's writing in the time on her time card (assuming she was at the workplace until at least 1:00 p.m. as discussed under infraction number 2 above. Based on the facts presented it has not been proven that Baum was not

present until at least 1:00 p.m.) does not constitute a disciplinable offense because it has been shown by the testimony of co-workers as well as that of Supervisor Moore that it was the practice for employees to write in entries on their cards when errors were made. Moore testified that it was the practice that such entries need not always be initialed by her to be valid. Examination of the time card exhibits shows a significant number of cards of a number of the employees in the department that were hand marked, not initialed, and still approved for payment.

5. Intentionally providing false and misleading information to hospital personnel during disciplinary investigations and otheRwise attempting to interfere with the investigation.

5. (a.) You concocted an untrue alibi in an effort to erroneously prove that you didn't leave work early on November 2nd. Subsequent discussions with Chris Vandercook and other witnesses established that the account given by you was intentionally false and misleading.

Pursuant to the discussion under Infraction number two above there is not adequate proof to justify discipline.

5. (b.) You provided false information about an incident involving Melody Ferris on September 26th. You said you saw her in the locker room at 12:45 p.m. However, several witnesses have stated that Melody Ferris was not in the hospital building after 10:30 a.m. and that you told them that she had gone home.

This matter was dealt with under Infraction number 2. (b). There is not adequate proof to justify discipline for this offense.

5. (c.) On October 22, 1987 you stated that you left the hospital with Melody Ferris shortly after 1:00 p.m. Several witnesses have stated that Melody Ferris had not been in the building for several hours. In fact she was seen leaving the building at approximately 10:30 a.m.

On October 22, 1987, Melody Ferris' time card was not punched out on the time clock. Ms. Ferris claimed both at the arbitration hearing and to Mr. Pogarch during his investigation that she left work after 1:00 p.m. on October 22, 1987. She admitted that she did not punch out on that date, but simply wrote "eight" on her time card to signify that she had worked eight hours.

The hospital relied on the statement of Sharon May to the NLRB to implicate Grievant Baum in a lie as Baum had told Mr. Pogarch that she left with Ferris on October at 1:00 p.m.

In her sworn Affidavit to the NLRB of January 27, 1988, Ms. May stated:

> "In Late October I cannot recall the exact date. it could have been October 22, I was arriving for work, it could have been 9:30 or 11:00 a.m. I am not sure, I was coming in the door and just opening it, Melody Ferris was also opening the door to leave. We scared each other. Melody left and went out to the parking lot, I went into work. Out of curiosity I did pick up her time clock and notice that she did not punch out. When I got upstairs, another employee asked me if I had seen Melody, and I said I had just seen her leave."

Other employees stated that they did not see Ferris at work after approximately 10:30 a.m. that day.

Charlotte Baum and Melody Ferris in their testimony at the arbitration hearing explained that Ferris' failure to punch her time card probably resulted from a disturbing telephone conversation Ferris had with her husband prior to leaving work on October 22.

Effie Miracle testified that she had a conversation with Ferris some time in September or October of 1987 about a time card that Ferris forgot to punch out when leaving the Hospital the previous day. Miracle testified she knew that Ferris had worked until 1:00 p.m. that day because she, Ferris and Baum had walked out of work together. Miracle also testified that she felt that the cause for Ferris' walking out without punching out was difficulties between Ferris and her husband.

The only time card of Ferris that was marked with a handwritten "8" during that time period was that of October 22, 1987.

There is no witness that saw Baum tamper with Ferris' time card on October 22. There is no witness that stated that they saw Baum leave the workplace alone that day.

Mr. Pogarch testified that he based his charge on the fact that since he believed Baum was lying concerning the other allegations, he assumed she was lying here also.

The testimony regarding this allegation is inconclusive. The Hospital relied on the statement of an employee who was not sure of the exact date that she saw Ferris leave work early. Another described an occasion during the same time of the year when Ferris had an argument with her husband and left at 1:00 p.m. with Baum and her (Miracle).

The allegation is not proven and does not justify disciplinary action.

5. (d.) Additional statements given by you regarding the incidents referred to above and subsequent related events have been proven by witnesses not to be true.

That allegation is dependent upon the rest of the allegations being true and Baum's denials being false. There is inadequate proof and, therefore, no just cause for discipline.

6. Repeated violation of the rules.

Your disciplinary record reflects a pattern of continual disregard of hospital rules.

9/09/80	Verbal warning – excessive tardiness
4/27/81	Verbal warning – leaving work area
5/01/81	Written warning – leaving work area
9/17/81	Verbal warning – failure to empty trash
7/26/82	Written warning – misrepresentation of working hours
8/31/84	Warning – use of foul and abusive language to a supervisor
2/21/85	Verbal warning – leaving work station to conduct union business
2/21/85	Verbal warning – creating a disturbance
6/27/85	Written warning – did not comply with work assignment
8/05/86	Conference regarding inappropriate statement to co-workers (not part of personnel filed
9/03/87	Written warning – abusive language

The documents constituting Ms. Baum's disciplinary record were entered as exhibits at the arbitration hearing. Close examination reveals the following:

Date	Offense	Disposition
9/9/80	Tardy 5 times in 2 months.	First warning
3/11/81	Memo regarding excused absences.	No discipline
4/22/81	Employee conference regarding abiding by job description and remaining at work station.	Verbal discussion and warning
5/1/81	Leaving department without notification.	Written reprimand
9/17/81	Failure to empty trash.	Verbal reprimand
7/16/82	Employee conference regarding clarification of hospital position regarding reassignment of responsibilities in cases of emergency.	No discipline
7/26/82	Misrepresentation of working hours on time card.	Written reprimand
8/31/84	Employee conference regarding use of abusive language towards a supervisor.	Warning

2/19/85	Employee yelled from cafeteria line to kitchen "You serving cafeteria Mrs. Moore" interrupting a conversation between the supervisor and department head in the supervisor's office.	Verbal warning
2/20/85	Employee conference concerning leaving the work station to take an incoming phone call regarding union business.	Verbal warning
6/27/85	Employee did not prepare the ground meat for salad department as requested by supervisor.	Written warning
9/3/87	Employee used abusive language: "Getting on her damned high horse" to supervisor.	Written warning

The Union pointed out that prior to November 13, 1987, the Grievant had received only oral and written warnings and had never been suspended nor had her pay docked for any disciplinary reason. It is evident by the significantly fewer number of disciplinary contacts with the Grievant in the two years prior to the discharge as compared to 1985 and earlier, that Grievant's conduct had improved. The employee's record, standing alone, does not simply justify further discipline. It can only be used in conjunction with another proven offense to aid the employer in determining if termination or behavior modification is in order and if it is, which behavior modification action is appropriate and to help justify the appropriate degree of discipline.

CONCLUSION

The Employer has charged Charlotte Baum with infractions in six major categories. Included in the six categories were at least sixteen separate offenses.

It is evident that in late 1987 the Hospital believed that there was a serious attendance and time card problem spread throughout the Dietary Department.

Department Head Hind who did not testify at the arbitration hearing was reported by Dennis Pogarch in Pogarch's testimony at the arbitration hearing to have indicated to Pogarch months before the Baum discharge that he (Hind) suspected there was a problem with attendance and time card punching.

In September, 1987, Hind recruited Florence Smallwood to assist him in investigating the situation in the Dietary Department.

Eva Moore, the direct Supervisor of the Dietary Department staff, although she denied it in her testimony, is reported by other employees to have told them earlier than July of 1987 that she had "visions" that Baum was an evil ringleader and troublemaker. She made accusations that Baum had stolen Hospital property that turned out not to have been stolen at all.

None of the proofs offered as to any of the offenses of Baum came directly from Supervisor Moore or Department Head Hind. The investigation was conducted mostly after the fact by Dennis Pogarch through the use of employee interviews. During Pogarch's investigation, at least two other employees, Kathy Respondeck and

Diane Boik, admitted punching the time cards of others or having theirs punched by others. (It should be noted that Boik recanted her admission.)

Smallwood, who openly stated that she was asked by Hind to investigate, and who admitted that she did investigate, brought no direct or substantial evidence against Baum.

In trying to understand the situation at Mercy-Memorial and after hearing all the testimony and reviewing and re-reviewing the transcripts and exhibits, questions arise such as:

> Where were the Supervisors when Ferris and others were noticed missing hours before the end of their shift?
>
> Why did Smallwood volunteer to go "undercover?"
>
> Why didn't Smallwood notify Moore or Hind immediately when she was in the middle of one of her numerous investigations as to the whereabouts of a missing employee?
>
> When Moore and Hind knew that there was a problem, why didn't they meet with the employees to take corrective action?

Instead of appropriate administrative, investigatory, or leadership action being taken by Hind or Moore, the job of policy administration/investigation/discipline fell to Dennis Pogarch, the Human Resources Director. The behavior of the Supervision in the Dietary Department was more like a "sting" operation than that of a business using leadership principles and corrective discipline to direct and guide employees as to appropriate behavior.

It is clear that the Hospital, through Human Resources Director Pogarth, believed that Baum was one of the ring leaders of a group of employees who were violating the attendance and time card policies.

Employees were called into mandatory investigative meetings by and with the Department Head and the Director of Human Resources. It is evident that as this began to happen, a type of momentum for self protection started to build.

During these mandatory, individual, investigative type meetings with Management, the employee has a choice of either indicating that everything in the areas discussed (attendance and time card procedures in this case) is perfect or that it is not; and if it is not, specifically what is amiss and who is responsible.

Because an employee can be disciplined or discharged as a result of what happens at the meeting (as with Boik, Ferris and Baum), the employees' employment future is at stake.

If an employee says that everything is perfect and it is found not to be, then it could well be assumed that the employee is conspiracy with the rule breakers. It is a much less dangerous road for one to protect one's job by reporting shortcomings while at the same time protecting ones personal relationship with co-employees by being vague or non-specific in accusations. Less than ethical individuals could also use this opportunity to attack those whom they do not care for. Momentum also allows for employees to get caught up in a job threatening situation where the primary motivation for survival

comes to the forefront. Employees may do or say things that they may otherwise not do or say.

The momentum for self protection increases as reports as to what is happening in an investigation begin to build a case that irregularities have been discovered. There is a tendency for the employees to perceive that the Employer is aware of rule violations and anticipate that the Employer will take action. This is exacerbated when supervisors begin meetings with accusations such as Hind did when he began the meeting with Boik by stating that he already knew that Boik was acting in concert with Ferris and Baum in wrongful time card punching.

As the perception of the employees that the employer has discovered violations strengthens, the Employer is forced to take action to forestall the belief of employees that rules not need be followed as they will not be enforced.

Baum and Ferris were singled out early in the investigation by Hind, who when he recruited Smallwood to help him, indicated that he suspected Ferris and Baum. Baum had already been singled out by Supervisor, Eva Moore's reporting to other employees of her "visions from God". The momentum grew for employees to follow the lead of Management in blaming Baum and Ferris for infractions in order to save themselves. This is exemplified by Hind's offer of immunity to Boik if she would implicate Baum and Ferris in wrongdoing.

In that respect Kathy Respondeck and Diane Boik were both found to have violated policies by punching the time card of another, or having another punch their time card. They both gave statements against Baum and Ferris. Neither was even disciplined for their offense.

The Employer stated that Respondeck was not disciplined because her offense was not part of a pattern.

Boik was granted "immunity" for discipline when she signed an Affidavit implicating Baum and Ferris and punching her time card. Boik recanted her incriminating statements against Baum and Ferris to the Human Resource Director the day after she made them, the Hospital's attorney the day after that, and the NLRB Agent a month later (and also at the arbitration hearing), but the Human Resource Director stated he relied on her original statement and discounted the recantations.

The momentum against Baum continued to grow.

The Human Resource Director admitted at the arbitration that the reason that he believed that Baum lied to him about Melody Ferris leaving with her at the normal quitting time on October 22, 1987 is that Baum had lied before.

In many cases, as the result of the momentum, hard facts and direct evidence surface if they exist. There was, however, insufficient evidence produced regarding the activities of Charlotte Baum in this case to find her guilty of the most serious offenses that were alleged.

The language of the collective bargaining agreement states that the Arbitrator may not substitute his judgment for that of the Hospital as to the reasonableness of any practice, policy or rule, nor the severity or degree of the penalty regarding a disciplinary action.

Both the Collective Bargaining Agreement and the Employee Handbook name offenses that call for discharge. The offense for which Charlotte Baum has been

found guilty, Asking and Encouraging Other Employees to Break Hospital Rules, is not one of the named offenses calling for automatic discharge.

The Employer argues that if the Grievant is guilty of any one of the alleged offenses, that guilt constitutes grounds for discharge. The Employer, however, through its collective bargaining agreement provisions for just cause (Article VIII, Section 1) and Employee Handbook provisions for Progressive discipline sets a policy for adherence to corrective/progressive discipline procedures. The collective bargaining agreement is a contract running for the benefit of the employee in providing job security unless there is just cause for discharge.

The essence of a corrective/progressive policy is that employees are put on notice of what is expected and what is prohibited through the actions of the Employer; and behavior modification techniques are applied to guide the employee away from unacceptable behavior when it occurs and toward good behavior. Employees also learn to know what is expected through observing what happens to other employees under like circumstances.

Charlotte Baum's disciplinary record, while not very good through 1985, showed much improvement for the last two years before her discharge.

Baum's proven offense occurred in an atmosphere where there has been lack of adherence to procedure such as the procurement of replacement cooks in the event of illness, initialing of handwritten or corrected time card entries by a number of employees in the Department without supervisory approval being required, and lack of supervision in terms of accountability for employees being at their

work station. Other employees who admitted actually punching the time cards of others or having their time cards punched by others were not discharged because the employer determined that their acts were not part of a pattern of activity. (Even Diane Boik who admitted time card violations and was given immunity for signing a statement implicating Baum in wrongdoing was not disciplined after she recanted.)

No pattern of such activity has been proven to have been engaged in by Charlotte Baum. Ms. Baum, through the totality of charges filed by the Employer, was really charged with being a ring leader of rule breaking and wrongful activities. She has not been proven to be a ring leader , and thus, is not guilty of the charges brought by the Employer. Baum's Proven offense, given the totality of circumstances, while it merits discipline, does not constitute just cause for discharge.

The proofs submitted for the other alleged offenses were reexamined in light of the Grievant's being found guilty of this offense. After careful and thorough examination, it is determined that the guilt of this offense coupled with the proofs submitted regarding the other alleged offenses do not establish guilt in any of the others.

DECISION

After thorough and careful consideration of all the facts it is found that the Hospital discharged Charlotte Baum for a series of offenses that it believed she committed as a ring leader of wrongful and rule breaking activity at the Hospital.

Charlotte Baum has not been proven to be guilty of being a ring leader of wrongful activity nor of any of the named dischargeable offenses under the collective bargaining agreement or Employee Handbook, nor of any of the most serious counts alleged by the Employer.

Because Charlotte Baum has been proven guilty of the lesser offense of asking another employee, Stella Richter, to break Hospital rules, appropriate disciplinary action other than discharge is in order. It is noted that in relation to Baum's offense, Richter did not leave early; nor did she have someone else punch her card; nor did she punch the card of Baum.

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

S.E.I.U., Local 79

-and- Gr: Charlotte Baum

Mercy Memorial Hospital

CASE NUMBER: 54 39 0746 90

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

See attached award

/s/ Michael P. Long
Arbitrator's signature (dated)

MICHAEL P. LONG

STATE OF Michigan)
) ss.:
COUNTY OF Oakland)

On this 9th day of July, 1992, before me personally came and appeared Michael P. Long to me known and known to me to be the individual(s) described in and

who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/ Josephine M. Long
Josephine M. Long,
Notary Public

JOSEPHINE MORICI LONG
Notary Public, Oakland County, MI
My Commission Expires Mar. 15, 1995

AWARD

The grievance is partially granted and partially denied.

The discharge of Charlotte Baum is reduced to a seven day suspension without pay. Charlotte Baum is to be returned to work and made whole except for the seven day suspension and subject to the following provision:

> Any wages, including the cost value of fringe benefits earned by Ms. Baum in the interim, are to be subtracted from the amounts of wages and fringe benefits, including pension contributions, she would have earned if she had remained on the payroll at the Hospital in her position as cook.

Pursuant to Article XI, Section 6 of the collective bargaining agreement, it is determined that neither side "won" the arbitration. The grievance is partially granted as described above in that the employee will return to work; it is denied in that the employee is found guilty of a portion of the offense as alleged and shall receive a seven day suspension without pay. Specifically, both parties as designated as losers, and they shall share the fee of the

Arbitrator, travel expenses and the cost of the room or facilities and the expenses of the arbitration equally.

July 9, 1992

/s/ Michael P. Long
Michael P. Long, Arbitrator

APPENDIX D

AGREEMENT

Between

MERCY-MEMORIAL HOSPITAL CORPORATION

And

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Effective through December 31, 1985

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* * *

SECTION 5. The Union accepts full responsibility for the authenticity of each authorization card and shall indemnify and save the Hospital harmless against any and all claims, demands, suits or other forms of liability that shall arise out of or by reason of any actions taken or not taken by the Hospital under the terms of this Article. The Hospital shall not be liable to the Union by reason of the requirements of this Agreement for the remittance or payment of any sum other than those constituting actual deductions made from wages earned by employees, said deductions to only be made in accordance with this Article. The Hospital shall have no responsibility for the collection of initiation fees, special assessments or any other deductions not in accordance with this Article.

SECTION 6. The Union will furnish the Hospital with a check-off list in duplicate each month, indicating thereon the amount due for each employee. In the event a new employee is added to the list, the addition will be so noted and the Hospital will include the address, social security number, and date of hire for the employee. One copy of the checkoff list shall be returned with the dues amount remitted each month.

ARTICLE III – MANAGEMENT RIGHTS

SECTION 1. The Hospital retains and shall have the sole and exclusive right and shall have a free hand to manage and operate the Hospital, including all of its operations and activities, to decide the number of employees to direct the work force including transferring work into or out of the bargaining unit, determining the size of the

work force and the number of employees assigned to any location, station or job, establishing, changing or combining job classifications and presribing [sic] and assigning job duties, content and classifications and to determine starting and quitting times and the number of hours to be worked and to set the work schedule and workweek, to establish Hospital policies and procedures, to determine the type and scope of services to be furnished to patients and the nature of the facilities to be operated, to establish schedules of operation and to determine the methods, procedures, and means of providing services to patients, to introduce new euqipment [sic] or processes, change or eliminate existing equipment and processes and institute technological changes, subcontract or purchase any and all work processes or services, to elect to open and/or operate other Hospital branches and clinics, to merge or consolidate with any other Hospital or medical hospital group, and to discontinue a part or all of the operations of the Hospital if in the sole judgment of the Hospital it is deemed necessary or believed advisable to discontinue operating a part of or all of the facility. All of such rights are vested exclusively in the Hospital and shall not be subject to the Grievance Procedure or any appeal from the exercise by the Hospital of such rights.

SECTION 2. The Hospital, in addition to the rights set forth in Section 1 above, shall have the right to promote, assign, transfer, suspend, discipline, discharge, layoff, and recall, to make and establish work rules of conduct and fix and determine penalties for violation of such rules, to maintain discipline and efficiency among employees, and to establish and assign contingent and/or temporary personnel; provided that such rights shall not

be exercised by the Hospital in contravention of any of the express provisions of this Agreement.

SECTION 3. The Hospital retains and shall have the sole and exclusive right to administer without limitation, implied or otherwise, all matters not specifically and expressly covered by the provisions of Section 2 of this Article or excepted by the provisions of any other Article of this Agreement.

ARTICLE IV – REPRESENTATION

SECTION 1. For the handling of grievances in its behalf, the employees may elect a steward(s) and alternate(s) for each shift and area as provided below. Each steward and alternate must have at least six (6) months seniority with the Hospital and be on the active payroll when elected. The Union shall notify the Hospital in writing of the name of each person and the Hospital shall not be obligated to recognize any steward or alternate until such notification. Neither the Union nor its employee representatives nor any employee shall advise or direct employees to disregard the orders of supervision.

SECTION 2. Each steward and alternate shall be elected from a definitely defined district and shift and shall represent only those employees in his/her respective district and shift, and only on days when he/she is scheduled to work. The shifts and districts shall be the following:

> One steward from among the employees on the first (day) shift in housekeeping, dietary and maintenance.

One steward from among the employees on the first shift in nursing service and all others.

* * *

the group may file the grievance at Step Two, if the grievance names all the employees involved and is signed by all involved.

SECTION 5. Any grievance which arose prior to the effective date of this Agreement shall not be processed.

SECTION 6. "Days" for purposes of this Article, shall be Monday, Tuesday, Wednesday, Thursday, and Friday, excluding observed holidays.

SECTION 7. If an employee is terminated or given a disciplinary suspension, the employee shall have the right to grieve the action provided the employee signs and files a written grievance (in the form in Step 2) at Step Three of the Grievance Procedure within two days of the termination or suspension. The personnel director shall answer the grievance within three days from its receipt.

SECTION 8. Upon the signing of this Agreement, and thereafter as changes are made, the Hospital will notify the Union of the names of those individuals who are designated to handle grievances in the Grievance Procedure who are other than the employee's immediate supervisor, department head, personnel director, assistant administrator or administrator. It is further understood that the Hospital may designate individuals to act in the place of those specified in the Grievance Procedure.

ARTICLE VI – ARBITRATION

SECTION 1. If a grievance is not resolved in Step Four of the Grievance Procedure and if it involves an alleged violation of a specific Article and Section of this Agreement which is subject to arbitration, either party may, at its option, submit the grievance to arbitration by written notice delivered to the other party (i.e., Hospital Administrator or Local 79 President) as the case may be, twenty (20) days after receipt of the Hospital's answer in Step 4. The written notice shall identify the provisions of the Agreement allegedly violated, shall state the issues involved, the position of the parties filing for arbitration, and the relief requested. If no such notice is given within the twenty (20) day period, or if the matter is not otherwise timely, or if the matter is not subject to arbitration, the Hospital's answer shall be final and binding on the Union, the employee(s) involved and the Hospital.

SECTION 2. Following receipt of the notice to arbitrate, the Union and the Hospital will confer at a mutually agreeable time to select an Arbitrator. If an Arbitrator is not selected within ten (10) days following receipt of the written notice, either the Union or the Hospital may, within the next ten (10) days only, apply in writing to the American Arbitration Association for appointment of an arbitrator under its rules, with a copy to the other side. It is agreed that not more than one grievance may be submitted to the same Arbitrator at the same time unless otherwise mutually agreed in writing.

SECTION 3. The jurisdiction of the Arbitrator shall be limited to the determination of grievances properly

before him which involve an alleged violation of a specific article and section of this Agreement. If either party shall claim before the Arbitrator that a particular grievance fails to meet the tests of arbitrability, the Arbitrator shall proceed to decide such issue of arbitrability, including giving both sides the opportunity to file posthearing briefs, before proceeding to hear the case upon the merits. If the grievance concerns matters not subject to arbitration, the Arbitrator shall return the grievance and all documents relating thereto, to the parties without decision.

SECTION 4. Powers of the Arbitrator. The Arbitrator shall have no power to add to, subtract from, alter or modify any of the terms of this Agreement or any of the functions or responsibilities of the parties to these agreements, or to substitute his judgment for that of either party, where said party has been given discretion by this Agreement.

The Arbitrator shall have no power to establish wage scales or change any wage, or to rule on any issue or dispute arising under the pension or insurance program, or involving job content, work jurisdiction, or work assignments.

He shall have no power to change any practice, policy or rule of the Hospital not in conflict with the express provisions of this Agreement nor shall he substitute his judgment for that of the Hospital as to the reasonableness of any such practice, policy or rule. His power shall be limited to deciding whether the Hospital has violated a specific Article and Section of this Agreement, it being understood that in the case of disciplinary action, he shall

have no power to substitute his judgment for that of the Hospital's as to the severity or degree of the penalty.

The Arbitrator shall not imply obligations or conditions binding upon the Hospital from this Agreement, it being understood that any matter not specifically set forth herein, remains within the reserved right of the Hospital.

SECTION 5. At the close of the hearing, the Arbitrator shall afford the Hospital and the Union a reasonable opportunity to furnish briefs.

SECTION 6. Each party shall pay its own costs of processing grievances through the Grievance and Arbitration Procedures. The fee of the Arbitrator, his travel expenses, and the cost of any room or facilities and the expenses of the Arbitration, including the expense of a transcript, if any, shall be borne by the losing party. The fees and the wages of representatives, counsel, witnesses, or other persons attending the hearing on behalf of a party and all other expenses shall be borne by the party incurring the same. All filing fees of the American Arbitration Association shall be paid by the losing party. The Arbitrator shall designate the losing party.

SECTION 7. After a case has been appealed to the American Arbitration Association, it cannot be withdrawn except by mutual written agreement of the parties.

SECTION 8. The Arbitrator's decision, when made in accordance with his jurisdiction and authority established by this Agreement shall be final and binding with respect to disciplinary suspensions and discharges but on all other matters it shall be advisory only. The Hospital shall

notify the Union in writing within twenty (20) days following receipt of the Arbitrator's award whether or not it agrees to be bound by the award, and in the event it agrees to be bound, said award shall be final and binding on the Union, the employee or employees involved and the Hospital.

ARTICLE VII – NO-STRIKE CLAUSE

SECTION 1. During the life of this Agreement, the Union shall not cause, authorize, sanction, threaten, or permit its members to cause or threaten, nor shall any member of the Union or any employee in the bargaining unit take part in any strike, sit-down, stay-in, slow-down, work stoppage, curtailment of work, interference or interruption of patient care, concerted use of paid leave time, restriction of work, or sympathy strike, including the failure to cross any picket line, or other interference with the operations of the Hospital of any kind for any reason. During the life of this Agreement, the Union shall also not cause, authorize, sanction, condone or threaten, nor shall any member of the Union or any employee of the bargaining unit take part in any picketing of the Hosptial's [sic] buildings or premises because of a labor dispute with the Hospital.

SECTION 2. The Hospital shall have the right to discipline or discharge any employee participating in any way in any violation of this Article. In addition, the Hospital shall have the right to obtain injunctive relief in addition to any other remedies it may have for violation by law.

ARTICLE VIII – DISMISSALS

SECTION 1. After completion of the probationary period, no employee shall be discharged or suspended without just cause. Just cause for immediate discharge shall include such acts as: misappropriation of funds or theft; assault or attempted assault of a patient or personnel of the Hospital; being under the influence of alcohol or drinking alcohol on Hospital premises; illegal use of drugs or narcotics; deliberate and material falsification of Hospital records; or gross personal misconduct detrimental to patients.

ARTICLE IX – SENIORITY

SECTION 1. Full-time employees shall be subject to a probationary period of ninety (90) days of work in a one (1) year period and regular part-time employees shall be subject to a 720-hour probationary period. During the employee's probationary period, the Hospital shall have the right to terminate, discharge, transfer, or discipline without regard to the provisions of this Agreement, and there shall be no right to grieve such action. Upon the completion of an employee's probationary period, seniority shall begin (accrue) from the last date of hire.

When more than one (1) full-time or part-time employee accrues seniority on the same date, order of placement on the seniority list shall be determined by the last four (4) digits of the employee's social security number.

SECTION 2. Upon the signing of this initial contract, the Hospital shall post copies of the two seniority lists, one

for full-time employees and one for part-time employees, on the bulletin boards in each department. The seniority lists shall contain the employee's date of hire and classification. Any corrections therein must be requested in writing within fourteen (14) days thereafter; and, if not so requested, the list shall become final at the end of such period. The Hospital shall continue to furnish the Union an up-to-date seniority list every six (6) months. In no event shall the Hospital be required to pay back pay by reason of the correction of an error on such lists.

Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-252

In The

Supreme Court of the United States

October Term, 1994

MERCY MEMORIAL HOSPITAL CORPORATION,

Petitioner,

v.

HOSPITAL EMPLOYEE'S DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The opinions below, the basis for this Court's jurisdiction, and the relevant statutory provision are set forth in the Petition for a Writ of Certiorari at 1-2 and Appendix A, B, and C, and are therefore not reprinted here.

STATEMENT OF THE CASE

This is a case to vacate a labor arbitration award. The arbitration award concerns the December 23, 1987 discharge of Petitioner's employee, Charlotte Baum. Petitioner and Ms. Baum's collective bargaining agent, The Hospital Employee's Division of Local 79, Service Employees International Union, AFL-CIO ("Union"), agreed to arbitrate Ms. Baum's discharge as part of a settlement to resolve another case involving the same parties.[1]

[1] The prior litigation arose out of Petitioner's unsuccessful effort to oust the Union by subsidizing and assisting employees in two decertification campaigns. In that case, the Union and Ms. Baum sued Petitioner Mercy-Memorial Hospital Corporation ("Hospital" or "Petitioner") for violating the Labor-Management Relations Act, 29 U.S.C. Sec. 186(a)(3), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Sec. 1961, *et seq.*

The parties settled that case on May 1, 1990, agreeing to, among other things, submit Ms. Baum's grievance to "final and binding arbitration" under the parties' 1983-85 collective bargaining agreement ("Agreement"). (See Petition for a Writ of Certiorari ("Pet") at Appendix D.)

The nature of the dispute was the "Improper discipline and discharge of Charlotte Baum." See Resp. Brief App. A.

The parties arbitrated Ms. Baum's grievance for eleven days before Arbitrator Michael Long, an arbitrator mutually selected by the parties. During the hearing, twelve witnesses testified and fifty-four exhibits were admitted. At the hearing Petitioner argued that it had "just cause" to discharge Ms. Baum because she:

(1) tampered with time cards and punched another employee's time card;

(2) misrepresented Hospital time records;

(3) left work without permission;

(4) asked and encouraged co-workers to break hospital rules;

(5) gave "false and misleading information" to hospital management; and

(6) repeatedly violated Petitioner's work rules.

The Union argued that Ms. Baum, the Union Steward at the Hospital, did not violate any rule and Petitioner had no "just cause" to discharge Ms. Baum.

On July 9, 1992, the Arbitrator rendered a 62-page opinion which answered the question the parties hired him to resolve: whether Petitioner "improper[ly] discipline[d] and discharge[d] . . . Charlotte Baum." (Resp. Brief App. A.) The Arbitrator considered the facts, the Agreement's enumerated dischargeable offenses, the unilaterally implemented work rules, and every relevant Agreement provision, including a provision Petitioner

did not highlight for this Court in the Petition's statement of facts:

> **After completion of the probationary period, *no employee shall be discharged or suspended without just cause.* Just cause for immediate discharge shall include such acts as: misappropriation of funds or theft; assault or attempted assault of a patient or personnel of the Hospital; being under the influence of alcohol or drinking alcohol on the Hospital premises; illegal use of drugs or narcotics; deliberate and material falsification of Hospital records; or gross personal misconduct detrimental to patients.**

(Pet. App. D-11.) (Emphasis added.)

The Arbitrator *specifically* found no just cause for discharge. He categorically rejected the Hospital's claims that Ms. Baum tampered with time cards, misrepresented Hospital records, or left work without permission. (Pet App. C-48.) On three separate occasions, Arbitrator Long rejected the Hospital's claim that Ms. Baum intentionally provided false and misleading information to the Hospital during its investigation. And, he dismissed the Hospital's claim that Ms. Baum's employment history was just cause for discharge. (Pet. App. C-47.) According to the Arbitrator, the Hospital failed to prove that Ms. Baum was guilty of any dischargeable offense or work rule violation. (Pet. App. C-55.)

Although the Arbitrator found Ms. Baum "asked and encouraged" co-workers to punch her time card, one of the sixteen charges the Hospital lodged against her, he concluded that this violation, unenumerated and not

even mentioned in the Hospital's work rules, and utterly absent from the Agreement, did *not* constitute just cause for discharge. (Pet. App. C-53.) The Arbitrator concluded that the Hospital had improperly discharged Ms. Baum. (Pet. App. C-55.)[2]

The Hospital refused to honor the "final and binding" arbitration decision. Rather, it sued to vacate the award. In January 1993, the United States District Court for the Eastern District of Michigan upheld the award. (Pet. App. B.)

Thereafter, the Hospital appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit examined the arbitration decision and the Agreement to determine whether the decision "drew its essence" from the Agreement. (Pet. App. A-6.) On May 12, 1994, the Sixth Circuit made short order of the Hospital's challenge to the arbitration decision. Finding that the Arbitrator's interpretation of the Agreement was "proper," the Sixth Circuit upheld the arbitration award. (Pet. App. A-9).

On August 8, 1994, the Hospital appealed to this Court.

REASONS FOR DENYING THE WRIT

The Hospital's petition is patently without merit. But, Respondent must address Petitioner's legal and factual

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[2] Arbitrator Long also found that the Hospital conducted a "chilling" investigation that targeted Ms. Baum and encouraged employees to implicate Ms. Baum in wrongdoing to "save themselves." (Pet. App. C-50-51.)

misrepresentations. *See* Sup. Ct. R. 15 ("Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition* and not later.").

As early as 1960, this Court articulated the law applicable to this case. *See* the *Steelworkers Trilogy;*[3] *see also, United Paperworkers International v. Misco,* 484 U.S. 29 (1987). Even more recently, this Court has referred approvingly to these cases, now the cornerstones of labor arbitration law. *See Groves v. Ring Screw Works,* 498 U.S. 168, n.11 (1990); *AT&T Technologies v. Communication Workers of America,* 475 U.S. 643, 648 (1986).

This Petition merely disputes the Sixth Circuit's application of settled law. And, the Hospital's fact-laden Petition makes obvious what Petitioner actually tries to conceal: that this Petition involves only a fact-specific controversy that is best left resolved in the lower federal courts. Therefore, this Petition presents no question to merit this Court's review.[4]

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[3] *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960).

[4] This Court has refused to grant certiorari to arbitration appeals every single time but once during its last three terms. During the 1991-92 and 1993-94 terms, this Court denied review to every petition seeking review of an arbitration award. *See U.S.L.W.,* Vol. 62 at 44; Vol. 60 at 46. This Court only accepted review of one question of one petition during its 1992-93 term. That case involved the National Labor Relations Board's setting aside of arbitration facts to award reinstatement and back pay to a grievant. *See U.S.L.W.,* Vol. 61 at 49.

The Hospital also asserts that the Sixth Circuit's decision "conflicts" with its *own* and other circuits' decisions. *See* Sup. Ct. R. 10(a). But, this is a transparent attempt to formulate the Petition to gain this Court's review. There is no intra- or inter-circuit conflict.

The Hospital finally claims that the Sixth Circuit's decision is "clearly erroneous." (Pet. at 16.) But, the Sixth Circuit decision the Hospital seeks to appeal comports scrupulously with this Court's decisions, its own decisions, and other circuits' decisions. The Sixth Circuit merely applied settled, uniform arbitration law.

The Hospital has now run out of appeals of right. Its unreasonable effort to avoid a two-year-old arbitration award has driven the Hospital to file this frivolous and politically motivated petition. In doing so, the Hospital wastes this Court's precious time and attention.

The Hospital's Petition is without merit. When its flimsy window dressing is removed, all that remains is the arbitration loser's familiar but fatigued lament: that the arbitrator's fact finding was flawed and the award did not draw its essence from the contract. This does not justify this Court's exercise of jurisdiction.

ARGUMENT

The Hospital asks this Court to review an arbitration award it claims the Sixth Circuit erroneously affirmed. The Hospital first asserts that *Misco* contains a "precise exception" that applies to this case. (Pet. at 13.) Secondly, the Hospital claims that the Sixth Circuit did not apply

this "precise exception" to determine the award's validity. (Pet. at 14, 16-27.) Finally, the Hospital proposes that the arbitration award is not supported by the facts or the Agreement. (Pet. at 27-30.)

These assertions form the Hospital's single contention: that the Sixth Circuit upheld an arbitration award that did not draw its essence from the Agreement. This claim is false.

A. Petitioner's Precise Exception Claim Under *Misco*

Petitioner cites *Misco*, this Court's most recent, detailed pronouncement on a court's scope of arbitration award review, to support its case. Petitioner claims that *Misco* contains "the precise exception to the general rule which controls this case." (Pet. at 13.) As if it uncovered new law, the Hospital argues that *Misco's* "precise exception" is that an arbitrator cannot fashion a grievance remedy when the Agreement unambiguously precludes the arbitrator from doing so.

But, the Hospital is replowing old ground. The Hospital's so-called "precise exception" merely restates this Courts' nearly thirty-five-year-old general rule that "an arbitrator is confined to interpretation and application of the collective bargaining agreement." *Enterprise Wheel*, 363 U.S. at 597.

Petitioner's rendition of the so-called *Misco* "precise exception" is a self-serving compilation of disconnected and incomplete *Misco* statements, reconnected to state the proposition Petitioner seeks. (Pet. at 13-14.) This

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approach to legal analysis is unsupportable and intellectually dishonest.

Thus, Petitioner creates its "precise exception" at Pet. 13-14:

> **[T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice . . . the parties, of course, may limit the discretion of the arbitrator . . . and it may be, as the Company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found.**

But, the *Misco* decision is more comprehensive than the Hospital admits. The *Misco* decision anticipated routine challenges to an arbitrator's decision. Thus, this Court actually stated:

> **[T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. *But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision . . .***

Misco at 38. (Emphasis added.)

In *Misco*, this Court addressed the obvious tension between limitations on an arbitrator's authority, however

imposed, and the parties' agreement to let the arbitrator decide whether "just cause" exists for discharge. Thus, this Court wrote:

> **The parties, of course, may limit the discretion of the arbitrator in this respect [formulating remedies]; and it may be, as the Company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found.** ***But the parties stipulated that the issue before the arbitrator was whether there was "just" cause for discharge, and the arbitrator, in the course of his opinion, cryptically observed that Rule II.1 merely listed causes for discharge and did not expressly provide for immediate discharge.***

Misco at 40-41. (Emphasis added.)

Despite the Hospital's efforts to bend *Misco* to its argument, *Misco* merely amplifies the *Steelworkers Trilogy* which sets the standard for arbitration award review. Petitioner's characterization of its mangled quote as this Court's "precise language" on an arbitrator's authority to render a remedy under a particular contract is false and self-serving.

Here, the Sixth Circuit properly applied *Misco*, not the Hospital's version of *Misco*. Accordingly, the Petition should be denied.

B. Petitioner's Claims of Conflict

Petitioner claims that this Court should review the Sixth Circuit's decision because it improperly applied

Misco, its *own* decisions, and other circuits' decisions. The Hospital alludes to the Sixth Circuit's creation of an intra- and inter-circuit conflict. There is no conflict.

The Hospital mischaracterizes Sixth Circuit and other circuit law, and the record, in its doomed attempt to gain this Court's review. Petitioner relies on the Sixth Circuit cases cited at Pet. 14-15, Pet. n.1, and Pet. 17-27, where "[c]ourts have reversed arbitrator awards where the award conflicts with express provisions of the labor agreement." (Pet. at 14, n.1.)

But Petitioner's cited cases are inapposite because they all involve the vacation of an arbitration award when the reviewing court found the contract was *unambiguous* and the arbitrator's award was unsupportable in light of that unambiguity. That is not the case here. In this case, the Sixth Circuit specifically found the Agreement's relevant terms were susceptible to more than one interpretation. (Pet. App. A-7.) And, it concluded that the Arbitrator's interpretation of the Agreement's relevant terms was proper.

The Hospital disputes the Sixth Circuit's application of *Eberhard Foods v. Handy*, 868 F.2d 890 (6th Cir. 1989) (Pet. at 22). Yet, *Eberhard* is directly on point as it regards *ambiguous* contract language. Here, the Sixth Circuit specifically found the Agreement language ambiguous, suspectable to either Petitioner's or the Arbitrator's interpretation. (Pet. App. A-7.) The Sixth Circuit applied the appropriate law and chose the Arbitrator's interpretation.

The decision creates no conflict in the law. The Petition should be denied.

C. Petitioner's "Clearly Erroneous" Claims

Petitioner asserts that the Sixth Circuit's opinion is "clearly erroneous," but its lengthy discourse on the case facts underscores the Petition's complete lack of merit. Petitioner claims that the Sixth Circuit erred by:

- "misstat[ing] the Hospital's position" and not noting that Petitioner's argument rested on Article VI, Section 4 of the Agreement. (Pet. at 16.)
- "never address[ing] the express limitation on the power of the Arbitrator concerning modification of disciplinary penalties." (Pet. at 17.)
- "never address[ing] the management rights clause giving the Hospital the exclusive right to fix and determine disciplinary penalties." (*Id.*)
- "never address[ing] the section of the agreement which stated that an Arbitrator could not alter or modify the agreement nor imply any obligations which were not expressly stated."
- not applying "its prior opinions which reversed arbitration awards where the arbitrator exceeded an express limitation on his power." (*Id.*)

The cases Petitioner claims the Sixth Circuit erroneously did not apply, collected at Pet. 14-15, n.1 and 17-27, center on inapposite facts and contract language. The Sixth Circuit's opinion does not suffer from the afflictions Petitioner notes, assuming that such afflictions constitute "clear error" and require this Court's review.

Contrary to Petitioner's contention, the Sixth Circuit affirmed the arbitration award after examining Article VI, Section 4 (Pet. App. A-3), noting that Petitioner "relies on" Article VI, Section 4. (Pet. App. A-6.) The Sixth Circuit also understood Petitioner's contention "that, once the arbitrator found that Baum had committed an act meriting discipline, the Hospital had just cause to discharge her." (Pet. App. A-6.) It is the same argument Petitioner now asserts in its Petition.

But, the Sixth Circuit disagreed with the Hospital. (Pet. App. A-6.) The court examined the Arbitrator's opinion to determine whether it "drew its essence" from the Agreement. The court reviewed whether the Agreement supported the arbitrator's rendition of a remedy different from the employer's for an offense not enumerated in the Agreement or the work rules. The Sixth Circuit simply held that the Agreement was ambiguous, susceptible to two interpretations: Petitioner's interpretation and the arbitrator's interpretation. (Pet. App. A-7.) The court held that the arbitrator's interpretation was reasonable, based on the contract and facts, and affirmed the award. (Pet. App. A-7.)

Except for its blatant disregard for the rights of workers and their union, this is a pedestrian suit to vacate an arbitration award. It is properly in the domain of the lower federal courts.

In the past, this Court has rejected the tactics the Hospital has applied in its Petition. In *Warrior and Gulf Navigation Co.*, 363 U.S. at 585, this Court noted that:

> [T]he court should view with suspicion an attempt to persuade it to become entangled in

> the construction of the substantive provisions of a labor agreement . . . when the alternative is to utilize the services of an arbitrator.

Id.

By its Petition, the Hospital *is* seeking to entangle this Court "in the construction of the substantive provisions of a labor agreement." This is not the basis for the exercise of this Court's jurisdiction.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MILLER, COHEN, MARTENS,
ICE & GEARY, P.C.

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Attorneys for Respondent

Dated: October 12, 1994

APPENDIX A

American Arbitration Association

VOLUNTARY LABOR ARBITRATION RULES
DEMAND FOR ARBITRATION

Date: May 21, 1990

TO: (Name) Mercy Memorial Hospital
(of party upon whom the Demand is made)

(Street Address) 708 North Macomb Street

(City and State) Monroe, MI (Zip Code) 48161

(Telephone)_____

The undersigned, a party to an arbitration agreement contained in a written contract dated May 4, 1990, providing for arbitration, hereby demands arbitrator thereunder.

(attach arbitration clause or quote hereunder)

NATURE OF DISPUTE: Improper discipline and discharge of Charlotte Baum.

REMEDY SOUGHT: Reinstatement and make whole, including seniority, back-pay and benefits for grievant Charlotte Baum.

HEARING LOCALE REQUESTED: Southfield, MI

You are hereby notified that copies of our arbitration agreement and of this Demand are being filed with the American Arbitration Association at its Southfield, MI Regional Office, with the request that it commence the administration of the arbitration.

Name of Claimant Charlotte Baum
Signed /s/Christopher P. Legghio
Title Attorney for SEIU, Local 79 and Charlotte Baum
Address 17117 West Nine Mile Road, Suite 1400
City and State Southfield, MI Zip Code 48075
Telephone (313) 559-2110
Name of Attorney Christopher P. Legghio
Address 17117 West Nine Mile Road, Suite 1400
City and State Southfield, MI Zip Code 48075
Telephone (313) 559-2110

To institute proceedings, please send three copies of this Demand with the administrative fee, as provided in Section 43 of the Rules, to the AAA. Send original of Demand to Respondent.